No. 13220

United States
Court of Appeals
For the Ninth Circuit.

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, JAMES R. BRADBURN and CONSOLIDATED ENGINEERING CORPORATION,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

KENNY AND MORRIS,
250 North Hope St.,
Los Angeles 12, Calif.

For Appellee Consolidated Engineering Corporation:

LATHAM & WATKINS,
1112 Title Guarantee Bldg.,
411 West Fifth St.,
Los Angeles 13, Calif.

For Appellees William D. Nesbit, et al.:

WILLIS SARGENT and
SIDNEY H. WYSE,
510 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12582-HW Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

COMPLAINT FOR RECOVERY OF PROFITS REALIZED BY DEALINGS IN THE STOCK OF PLAINTIFF CORPORATION

Plaintiff, Consolidated Engineering Corporation, doing business at 620 North Lake Avenue, Pasadena, California, brings this, its complaint, against the above-named defendant, who is a resident of the County of Los Angeles, and alleges as follows:

I.

This action arises under Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p (b) as hereinafter more fully appears. Exclusive jurisdiction of actions arising under Section 16(b) of the Act is conferred upon the Federal Courts by Section 27 of that Act, U.S.C.A., Title 15, Section 78 aa. The amount in controversy exceeds Three Thousand Dollars ($3,000.00).

II.

The defendant, William D. Nesbit, was an officer of plaintiff, [2*] namely a Vice President, throughout the period during which the transactions hereinafter referred to took place.

III.

The stock of plaintiff consists of one class only, namely common stock. The common stock of the plaintiff is listed upon the Los Angeles Stock Exchange, a national securities exchange, and was so listed throughout the period during which the transactions hereinafter referred to took place.

IV.

Between March 1, 1949, and April 20, 1950, in transactions occurring within periods of less than six (6) months, the defendant made purchases and sales and sales and purchases of common stock issued by the plaintiff, as described specifically in Paragraph V. At the time of each of said purchases and sales and sales and purchases the defendant was the beneficial owner of the stock. From said transactions the defendant realized a profit.

V.

Between March 1, 1949, and April 20, 1950, the defendant made the following purchases and sales and sales and purchases of common stock issued by plaintiff:

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Purchases			Sales		
Date	No. of Shares	Amount Paid	Date	No. of Shares	Amount Received
3/ 1/49	100	$ 500.00	3/ 1/49	100	$ 700.30
3/14/49	900	4,500.00	3/ 8/49	100	700.30
8/ 9/49*	1300	6,500.00	3/11/49	600	4,201.80
4/17/50**	100	500.00	8/ 9/49	200	2,740.96
			8/17/49	400	5,494.36
			8/18/49	400	5,531.68
			9/23/49	300	4,148.76
			9/26/49	100	1,382.92
			9/28/49	100	1,382.92
			4/20/50	100	2,054.51
	2400	$12,000.00		2400	$28,338.51

VI.

The defendant now holds, and at all times herein mentioned has held, an option agreement, effective April 18, 1946, with the plaintiff pursuant to the terms of which the defendant is, and has been entitled to purchase Five Thousand (5,000) shares of plaintiff's stock, original issue, at Five Dollars ($5.00) per share. The option is exercisable over a period of five (5) years, but the number of shares purchased in any one year under the option agreement is not to exceed one-fifth of the total number of shares subject to the option. The option terminates at death, is not transferable, and is conditioned upon continuation of employment. All purchases by the defendant hereinabove referred to in Paragraph IV and set forth in Paragraph V were

* Actually 2,000 shares were purchased 8-9-49 but there are only sales of 1,300 shares within six (6) months of that date against which the purchases can be matched.

** Actually 1,000 shares were purchased 4-17-50 but there are only sales of 100 shares within six months of that date against which purchases can be matched.

made at Five Dollars ($5.00) per share pursuant to this option agreement with the plaintiff.

VII.

From the purchases and sales and sales and purchases, as set out in Paragraph V, of Twenty-Four Hundred (2,400) shares of stock issued by the plaintiff, the defendant has realized a profit of Sixteen Thousand Three Hundred Thirty-Eight Dollars Fifty-One Cents ($16,338.51). This profit inures to and is recoverable by the plaintiff under the provisions of Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p(b).

Wherefore, the plaintiff prays for judgment against the defendant as follows: [4]

1. For damages in the amount of Sixteen Thousand Three Hundred Thirty-Eight Dollars Fifty-One Cents ($16,338.51).

2. For its costs of suit herein.

3. For such other and further relief as may be proper in the premises.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 21, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER

Defendant, William D. Nesbit, in answer to the complaint of plaintiff, Consolidated Engineering Corporation, avers:

First Defense

I.

Answering Paragraph IV of the complaint, defendant admits that defendant made purchases and sales of stock of plaintiff during the period therein stated, in the manner and for the considerations hereinafter averred, and not otherwise. Defendant admits that at the time of each of said purchases and sales defendant was the beneficial owner of the stock, to the extent of one-half thereof, and no more, and in this respect defendant alleges that at all times mentioned in plaintiff's complaint, defendant and Esther Fe Nesbit were, and now are, husband and wife, residing in the State of California, and that the options held in the name of defendant, any and all shares of stock of plaintiff acquired in the name of defendant and all proceeds arising from the exercise of any such option or from the sale or other disposition of any such [7] shares were at all times, and now are, the community property of defendant and said Esther Fe Nesbit. Further answering said paragraph, defendant denies that defendant and his said wife realized any profit from these transactions.

II.

Answering Paragraph V of the complaint, defendant admits that defendant sold a total of 2,400 shares of plaintiff's stock, in the quantities, on the dates and for the price therein alleged.

Further answering Paragraph V, defendant denies that defendant made the purchases of shares therein alleged during the period therein stated, but admits that defendant made the following purchases of shares of plaintiff's stock, in the quantities, on the dates and for the cash consideration herein stated, as follows:

Date	No. of Shares	Amount Paid
March 4, 1949	100	$ 500
March 17, 1949	900	4,500
August 12, 1949	1000	5,000
September 28, 1949	1000	5,000

III.

Answering Paragraph VI of the complaint, defendant admits the allegations thereof except that defendant denies that said option was exercisable during any one year only as to one-fifth of the total number of shares subject thereto.

IV.

Answering Paragraph VII of the complaint, defendant denies that defendant and his said wife have realized any profit by reason of said purchases and sales.

Second Defense

The option agreement alleged in Paragraph VI of the complaint was one of a series of 16 such

agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employment of plaintiff at the salaries that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff. [8] Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the execution of such option agreement. Defendant has been continuously employed by plaintiff since prior to the date of said agreement and to the date of this answer, and has remained in such employment in reliance on the benefits of said option agreement in affording defendant additional compensation. At the time such option agreement was entered into the reasonable market value of the shares of plaintiff was less than $5.

Third Defense

During the period alleged in plaintiff's complaint, defendant and his said wife, due to their financial circumstances, were unable to purchase shares under the option agreement, and thereby to secure additional compensation or an interest in plaintiff, without selling a portion of such shares substantially at the same time. In addition, defendant and his said wife were taxable at the time of the execution of any such option upon the difference between the option price and the market value of the shares so purchased on any such date. Defendant and his said wife were unable to purchase any shares under such option and to pay the tax thereon without, at

substantially the same time, selling a portion of said shares.

Fourth Defense

In the purchases and sales of the stock of plaintiff by defendant during the period alleged in the complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director.

Fifth Defense

The value of plaintiff's stock purchased by defendant gradually appreciated between the time of the execution of the option agreement and the dates of the purchases and sales by defendant. That the values of the stock on the date of such purchases, were as follows:

Date	No. of Shs.	Cost	Market Value
March 4, 1949	100	$ 500	$ 700.00
March 17, 1949	900	4,500	6,750.00
August 12, 1949	1000	5,000	13,750.00
September 28, 1949	1000	5,000	13,937.50

Sixth Defense

Defendant made such purchases and sales under arrangements made by, and with the approval of, plaintiff and in reliance upon plaintiff's assurance that plaintiff claimed no interest in any profits arising from said transactions or otherwise. That defendant would not have purchased or sold said stock and would not have been able to purchase said stock except in reliance upon such assurances and such arrangements. Plaintiff is thereby estopped

from asserting any interest in and to any profits realized from said transactions or other interest in any way connected with said transactions.

Wherefore defendant prays that plaintiff take nothing by its complaint and for judgment against plaintiff for defendant's costs incurred in this proceeding.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1951. [10]

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION

A. Stipulation of Facts

It Is Hereby Stipulated and Agreed by Consolidated Engineering Corporation, plaintiff in the above-entitled action, by and through Latham & Watkins, attorneys for plaintiff, and William D. Nesbit, defendant in said action, by and through Willis Sargent and Sidney H. Wyse, attorneys for defendant, that the facts hereafter stated in this stipulation shall be deemed true for all purposes of said action.

It Is Further Stipulated and Agreed that this

stipulation is entered into by and between the parties without prejudice to the right of either party to object to the materiality or relevancy of any fact herein stated under the issues raised by any of the pleadings in this action. [12]

I.

On August 21, 1946, plaintiff and defendant executed an agreement in writing, entitled "Option Agreement." A full, true and correct copy of said agreement is annexed to this stipulation as Exhibit A.

II.

Defendant entered into the following transactions involving the acquisition of shares of plaintiff:

(a) On or about March 4, 1949, defendant executed a notice stating that defendant elected to purchase 100 shares under the option agreement. On March 4, 1949, California Trust Company issued certificate No. 2108, for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On March 4, 1949, defendant caused to be paid to California Trust Company the sum of $500, which sum was credited by California Trust Company to the account of plaintiff.

(b) On March 14, 1949, defendant executed a notice stating that defendant elected to purchase 900 shares under the option agreement. On March 17, 1949, California Trust Company issued certificates Nos. 2122 through 2130, each for 100 shares, representing the shares so purchased, and endorsed on

the option agreement a statement that the shares had been so issued. On March 17, 1949, defendant caused to be paid to California Trust Company the sum of $4,500, which sum was credited by California Trust Company to the account of plaintiff.

(c) On August 9, 1949, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On August 12, 1949, California Trust Company issued certificates Nos. 2759 through 2768, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On August 12, 1949, defendant caused to be paid to California Trust Company the sum of $5,000 which sum was credited by California Trust Company to the account of [13] plaintiff.

(d) On or about September 22, 1949, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On September 28, 1949, California Trust Company issued certificates Nos. 2925 through 2934, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On September 28, 1949, defendant caused to be paid to California Trust Company the sum of $5,000 which sum was credited by California Trust Company to the account of plaintiff.

(e) On April 7, 1950, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On April 25, 1950, California Trust Company issued certifi-

cates Nos. 3665 through 3674, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 12, 1950, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

III.

Defendant entered into the following transactions involving sales of shares of plaintiff:

(a) On March 1, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $700.30, and delivered to the broker certificate No. 2108, for 100 shares, to effect the sale.

(b) On March 8, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $700.30, and delivered to the broker certificate No. 2122, for 100 shares, to effect the sale.

(c) On March 11, 1949, defendant sold 600 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for [14] $4,201.83, and delivered to the broker certificates 2123 through 2128, each for 100 shares, to effect the sale.

(d) On August 9, 1949, defendant sold 500 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $6,852.40, and delivered to the broker certificates Nos. 2759, 2760, 2762 through 2764, each for 100 shares, to effect the sale.

(e) On August 17, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92, and delivered to the broker certificate No. 2765, for 100 shares, to effect the sale.

(f) On August 18, 1949, defendant sold 400 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $5,531.68, and delivered to the broker certificates Nos. 2761, 2766 through 2768, each for 100 shares, to effect the sale.

(g) On September 23, 1949, defendant sold 300 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $4,148.76, and delivered to the broker certificates Nos. 2927 through 2929, each for 100 shares, to effect the sale.

(h) On September 26, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92, and delivered to the broker certificate No. 2925, for 100 shares, to effect the sale.

(i) On September 28, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92, and delivered to the broker certificate No. 2926, for 100 shares, to effect the sale.

(j) On April 20, 1950, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,054.51, and delivered to the broker certificate No. 3300, for 100 shares, to effect the sale.

(k) On December 30, 1949, defendant surrendered certificates Nos. 2129, 2130 and 2930 through 2934, each for 100 shares, [15] to California Trust Company, which issued in exchange therefor certificates Nos. 3298, 3299 and 3300 through 3304, each for 100 shares, in the name of defendant and Esther Fe Nesbit, as joint tenants.

IV.

The range of prices at which shares of the plaintiff were bought and sold on the Los Angeles Stock Exchange, the bid and asked prices at which the shares were quoted on the Exchange on the days when no sales were effected, and the midpoint of such range or bid and asked prices were as follows, on the following listed dates:

Date		High	Low	Bid	Asked	Midpoint
8/21/46	Not Listed			4⅜	4⅞	4⅝
4/17/47	Not Listed			2¾	3¼	3
4/17/48	Not Listed			5⅛	5⅝	5⅜
3/ 4/49		7	7			7
3/14/49		7⅜	7⅜			7⅜
3/17/49		7½	7½			7½
4/16/49	(Saturday)*	No Sales		10¾	10⅞	10.81
4/18/49	(Monday)	11	10¾			10⅞
8/ 9/49		13⅞	13⅞			13⅞
8/12/49		13¾	13¾			13¾
9/22/49		13¾	13¾			13¾
9/28/49		14	14			14
4/ 7/50	Closed—Good Friday					
4/12/50		20⅜	20¼			20.31
4/17/50		20	20			20
4/25/50		21½	21¼			21⅜

* April 17, 1949, was Sunday.

V.

The dates on which the midpoint between the highest and lowest sales on the Los Angeles Stock Exchange was the lowest, during the following designated periods, and the high and low prices, and [16] the midpoints on such dates, were as follows:

Period	Date	High	Low	Midpoint
9/ 3/48 - 3/ 1/49	9/21/48	6⅝	6⅝	6⅝
9/10/48 - 3/ 8/49	9/21/48	6⅝	6⅝	6⅝
9/13/48 - 3/11/49	9/21/48	6⅝	6⅝	6⅝
2/11/49 - 8/ 9/49	2/11/49	7	7	7
2/19/49 - 8/17/49	3/ 1/49	7⅛	7	7.06
2/20/49 - 8/18/49	3/ 1/49	7⅛	7	7.06
3/ 1/49 - 8/30/49	3/ 1/49	7⅛	7	7.06
3/ 8/49 - 9/ 6/49	3/ 8/49	7⅛	7	7.06
3/11/49 - 9/ 9/49	3/11/49	7¼	7	7⅛
3/25/49 - 9/23/49	3/25/49	8	8	8
3/28/49 - 9/26/49	3/28/49	8½	8¼	8⅜
3/30/49 - 9/28/49	4/ 1/49	8½	8½	8½
8/ 9/49 - 2/ 7/50	9/12/49	13⅛	13⅛	13⅛
8/17/49 - 2/15/50	9/12/49	13⅛	13⅛	13⅛
8/18/49 - 2/16/50	9/12/49	13⅛	13⅛	13⅛
9/23/49 - 3/21/50	10/ 1/49	13½	13½	13½
9/26/49 - 3/24/50	10/ 1/49	13½	13½	13½
9/28/49 - 3/26/50	10/ 1/49	13½	13½	13½
10/22/49 - 4/20/50	10/24/49	16	16	16
4/20/50 - 10/18/50	7/18/50	19½	19⅛	19.31

VI.

At all times mentioned in this stipulation defendant and Esther Fe Nesbit were, and now are, husband and wife, and were, and now are residents of the State of California. Any reference in this stipulation to the acquisition or sale of the shares of plaintiff by defendant shall be without prejudice to any claim of defendant that the shares acquired

were acquired with, and were, community property of defendant and Esther Fe Nesbit, his wife, and that the proceeds of the sales of the shares were, and are, community property of defendant and Esther Fe Nesbit. [17]

VII.

The stock of the corporation was listed on the Los Angeles Stock Exchange, a national securities exchange, on April 23, 1948, and has been so listed at all times subsequent thereto. Prior to said date said stock was not listed on any national securities exchange.

VIII.

The Option Agreement between plaintiff and defendant was one of a series of sixteen such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employ of plaintiff at the salary that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff.

IX.

Defendant has been continuously employed by plaintiff since and prior to the time of said Option Agreement, and to the date of this stipulation.

X.

At the time said Option Agreement was entered into the fair market value of the shares of plaintiff was less than $5.00 per share.

XI.

There is attached hereto as Exhibit "B" a true and correct copy of the permit issued by the Division of Corporations of the State of California on July 23, 1946, authorizing plaintiff to enter into the option agreement with defendant and to sell shares pursuant thereto.

XII.

Between March 1, 1949, and April 20, 1950, plaintiff had a minimum of 174,190 shares of its common capital stock outstanding, of which, during the same period, defendant at no time owned more than 2,000 shares. [18]

XIII.

During the periods here involved Esther Fe Nesbit owned no shares of stock of plaintiff except whatever community property interest she may have possessed in the shares of stock standing in the name of defendant.

XIV.

At no time has Esther Fe Nesbit been either an officer or a director of plaintiff.

B. Statement of Facts Which Parties Are Unable to Concede

Plaintiff is unable to concede the following facts, but does not, as presently advised, intend to contest by evidence to the contrary:

(a) That the options held in the names of the defendants, any and all shares of stock of plaintiff acquired in the name of defendants, and all pro-

ceeds arising from the exercise of any such option or from the sale or disposition of any such shares were at all times, and now are, the community property of the defendants and their respective spouses;

(b) That defendants were induced to remain as employees of plaintiff by reason of the execution of the option agreement, or that they remained in such employment in reliance upon the benefits of said option agreements;

(c) That the defendants and their wives were unable to purchase shares under the option agreements, or to pay tax accruing upon such purchases, without selling a portion of such shares substantially at the same time.

C. Statement of Plaintiff's Objections to Admissibility of Stipulated Facts

Plaintiff reserves the following objections to the admissibility in evidence of the following facts:

(a) The facts set forth in Paragraph VIII herein, on the ground that said facts are irrelevant and immaterial, and, [19] under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

(b) The facts set forth in Paragraph X herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934

or on the amount of damages recoverable under said section.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

WILLIS SARGENT AND
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Dated: May 25, 1951. [20]

EXHIBIT A

Option Agreement

This Option Agreement made and entered into this 21st day of August, 1946, but effective as of April 18, 1946, by and between Consolidated Engineering Corporation, a California corporation, hereinafter referred to as Consolidated, and William D. Nesbit, a resident of Pasadena, California, hereinafter called Nesbit.

Witnesseth

That Consolidated does hereby grant to Nesbit an option to purchase a total of not to exceed 5,000 shares of its common capital stock of the par value of $1.00 per share upon the following terms and conditions:

(1) The total number of shares, option to purchase which is hereby granted to Nesbit, is 5,000.

(2) The term of this agreement shall commence on April 18, 1946, and shall expire on July 15, 1951, unless prior to said time this agreement has otherwise terminated.

(3) The option to purchase hereby given shall be exercisable only in the following manner:

(a) For the first year of this agreement, Nesbit shall have an option to purchase up to but not to exceed 1,000 shares, which option shall be exercisable on or after April 17, 1947;

(b) For the second year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1948;

(c) For the third year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1949;

(d) For the fourth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1950; [21]

(e) For the fifth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1951.

(4) All of the options hereby given, and particularly described in paragraph (3) above shall, unless this agreement is sooner terminated, expire on July 15, 1951. The exercise by Nesbit of his option in part only as to shares for any year shall

not be deemed to limit in any way his right to exercise his option as to the balance of said shares so long as his option is in effect and this agreement has not been terminated.

(5) If he shall elect to exercise the options hereby given, either in whole or in part, and whether at one time or from time to time, Nesbit shall forthwith give written notice thereof to Consolidated. Such notice shall be in writing, addressed to Consolidated, for the attention of the Secretary, and sent by registered mail, postage prepaid. Said notice, to be effective shall specify the number of shares as to which the option is exercised, and the denomination and the name or names in which the certificate or certificates evidencing the shares shall be issued, and shall be accompanied by certified or cashier's check for the full amount of the purchase price of the shares to be issued. Upon receipt of such notice, and the purchase price of the shares to be issued, Consolidated will issue, or cause to be issued, certificates evidencing the shares so purchased.

(6) The price at which any of the shares subject to the options hereby granted are to be sold is $5.00 per share.

(7) This agreement shall automatically terminate prior to July 15, 1951, upon the happening of any of the following events:

(a) The exercise by Nesbit of all of the options hereby granted and the completion of

payment for and delivery of the shares as to which the options have been exercised.

(b) The death of Nesbit.

(c) Termination of Nesbit's employment with Consolidated, whether for cause or otherwise, and whether voluntary or involuntary inso far as either party is concerned. [22]

(d) Any attempt by Nesbit to assign all or any part of his rights hereunder.

(e) The mutual agreement of the parties hereto. Upon termination hereof, any options hereby granted and then unexercised shall forthwith terminate and be of no further force or effect.

(8) It is understood and agreed that this agreement shall not become effective for any purpose unless and until a proper permit has been obtained from the Commissioner of Corporations of the State of California (a) authorizing the granting by Consolidated of the options hereby given, and (b) authorizing the issuance of the stock of Consolidated pursuant to the exercise of said options.

If at any time the permit or permits so obtained shall be revoked, or shall expire for reasons not within the control of Consolidated, then in such event Consolidated shall be relieved of any further obligation to issue any of its shares hereunder.

(9) If at any time subsequent to the effective date hereof Consolidated shall declare a stock dividend on its outstanding common stock, or shall make effective a stock-split, it is agreed that Nes-

bit's option to purchase shall be adjusted to give effect thereto. By way of illustration of the foregoing, if Consolidated should hereafter declare a stock dividend of one common share on each common share outstanding, Nesbit's option thereafter shall be to purchase two shares for each share subject to option prior to the dividend, and the price for the two shares shall be $5.00, or $2.50 per share.

(10) This agreement shall not be assignable either in whole or in part by Nesbit.

(11) This agreement shall inure to the benefit of and be binding upon the successors and/or assigns of Consolidated.

(12) Time is of the essence hereof. [23]

In Witness Whereof, we have hereunto set our hands as of the day and year first above written.

CONSOLIDATED ENGINEERING CORPORATION,

By /s/ PHILIP S. FOGG,

By /s/ JAMES B. CHRISTIE,

/s/ WILLIAM D. NESBIT. [24]

EXHIBIT B

Before the Department of Investment Division of Corporations of the State of California

In the matter of the application of "CONSOLIDATED ENGINEERING CORPORATION" for a Permit Authorizing It to Sell and Issue Its Securities

File No. 6546LA
Receipt No. LA A31774

PERMIT

This Permit Does not Constitute a Recommendation or Endorsement of the Securities Permitted to Be Issued, but Is Permissive Only

"Consolidated Engineering Corporation,"

a California corporation, is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to James R. Bradburn, William D. Nesbit and Paul F. Hawley option agreements substantially in the form and tenor of the copy contained in the amendment to application filed with the Commissioner of Corporations July 19, 1946, and pursuant thereto to sell and issue to them an aggregate of not to exceed 15,000 of its shares, at and for the price of $5.00 per share, cash, lawful money of the United States, for the uses and purposes recited in its application as modified by the amendment thereto, and so as to net applicant the full amount of the selling price thereof.

This permit is issued upon the following condition:

(a) That unless revoked or suspended, or renewed upon [25] application filed on or before the date of expiration specified in this condition, all authority to sell securities under paragraph 1 of this permit shall terminate and expire on the 15th day of July, 1951.

Dated: Los Angeles, California, July 23, 1946.

EDWIN M. DAUGHERTY,
Commissioner of
Corporations.

By /s/ J. A. HAHN,
Assistant Commissioner.

[Endorsed]: Filed May 28, 1951. [26]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12583-HW Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

COMPLAINT FOR RECOVERY OF PROFITS REALIZED BY DEALINGS IN THE STOCK OF PLAINTIFF CORPORATION

Plaintiff, Consolidated Engineering Corporation, doing business at 620 North Lake Avenue, Pasa-

dena, California, brings this, its complaint, against the above-named defendant, who is a resident of the County of Los Angeles, and alleges as follows:

I.

This action arises under Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 17 p (b) as hereinafter more fully appears. Exclusive jurisdiction of actions arising under Section 16 (b) of the Act is conferred upon the Federal Courts by Section 27 of that Act, U.S.C.A., Title 15, Section 78 aa. The amount in controversy exceeds Three Thousand Dollars ($3,000.00).

II.

The defendant, Hugh F. Colvin, was an officer of plaintiff, namely the Treasurer, throughout the period during which the [27] transactions hereinafter referred to took place.

III.

The stock of plaintiff consists of one class only, namely common stock. The common stock of the plaintiff is listed upon the Los Angeles Stock Exchange, a national securities exchange, and was so listed throughout the period during which the transactions hereinafter referred to took place.

IV.

Between March 25, 1949, and August 9, 1950, in transactions occurring within periods of less than six (6) months, the defendant made purchases and sales and sales and purchases of common stock

issued by the plaintiff, as described specifically in Paragraph V. At the time of each of said purchases and sales and sales and purchases the defendant was the beneficial owner of the stock. From said transactions the defendant realized a profit.

V.

Between March 25, 1949, and August 9, 1950, the defendant made the following purchases and sales and sales and purchases of common stock issued by plaintiff:

Purchases			Sales		
Date	No. of Shares	Amount Paid	Date	No. of Shares	Amount Received
3/31/49	300	$1,500.00	3/25/49	100	$ 786.93
4/ 7/49	300	1,500.00	3/31/49	200	1,672.86
5/20/49	100	500.00	4/11/49	300	2,769.16
7/22/49	100	500.00	9/29/49	100	1,382.92
8/ 9/50*	170	850.00	1/ 9/50	100	2,427.64
			8/ 7/50	170	3,651.60
Totals	970	$4,850.00		970	$12,691.11

VI.

The defendant now holds, and at all times herein mentioned [28] has held, an option agreement, effective August 1, 1947, with the plaintiff pursuant to the terms of which the defendant is, and has been, entitled to purchase Five Thousand (5,000) shares of plaintiff's stock, original issue, at Five Dollars ($5.00) per share. The option is exercisable over a period of five (5) years, but the number of shares purchased in any one year under the option agreement is not to exceed one-fifth of the total number

* (1,000 shares actually purchased 8-9-50 but only 170 can be matched against sales.)

of shares subject to the option. The option terminates at death, is not transferable, and is conditioned upon continuation of employment. All purchases by the defendant hereinabove referred to in Paragraph IV and set forth in Paragraph V were made at Five Dollars ($5.00) per share pursuant to this option agreement with the plaintiff.

VII.

From the purchases and sales and sales and purchases, as set out in Paragraph V, of Nine Hundred Seventy (970) shares of stock issued by the plaintiff, the defendant has realized a profit of Seven Thousand Eight Hundred Forty-one Dollars and Eleven Cents ($7,841.11). This profit inures to and is recoverable by the plaintiff under the provisions of Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p(b).

Wherefore, the plaintiff prays for judgment against the defendant as follows:

1. For damages in the amount of Seven Thousand Eight Hundred Forty-one Dollars Eleven Cents ($7,841.11).

2. For its costs of suit herein.

3. For such other and further relief as may be proper in the premises.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 21, 1950. [29]

[Title of District Court and Cause.]

No. 12583 C Civil

AMENDED ANSWER

Defendant, Hugh F. Colvin, in answer to the complaint of plaintiff, Consolidated Engineering Corporation, avers:

First Defense

I.

Answering Paragraph IV of the complaint, defendant admits that defendant made purchases and sales of stock of plaintiff during the period therein stated, in the manner and for the considerations hereinafter averred, and not otherwise. Defendant admits that at the time of each of said purchases and sales defendant was the beneficial owner of the stock, to the extent of one-half thereof, and no more, and in this respect defendant alleges that at all times mentioned in plaintiff's complaint, defendant and Audy Lou Colvin were, and now are, husband and wife, residing in the State of California, and that the options held in the name of defendant, any and all shares of stock of plaintiff acquired in the name of defendant and all proceeds arising from the exercise of any such option or from the sale or other disposition of any such shares were [31] at all times, and now are, the community property of defendant and said Audy Lou Colvin. Further answering said paragraph, defendant denies that defendant and his said wife realized any profit from these transactions.

II.

Answering Paragraph V of the complaint, defendant admits that defendant sold a total of 970 shares of plaintiff's stock, in the quantities, on the dates and for the price therein alleged.

Further answering Paragraph V, defendant denies that defendant made the purchases of shares therein alleged during the period therein stated, but admits that defendant made the following purchases of shares of plaintiff's stock, in the quantities, on the dates and for the cash consideration herein stated, as follows:

Date	No. of Shares	Amount Paid
April 8, 1949	300	$1,500
April 11, 1949	300	1,500
June 8, 1949	400	2,000
August 18, 1949	1000	5,000

III.

Answering Paragraph VI of the complaint, defendant admits the allegations thereof except that defendant denies that said option was exercisable during any one year only as to one-fifth of the total number of shares subject thereto.

IV.

Answering Paragraph VII of the complaint, defendant denies that defendant and his said wife have realized any profit by reason of said purchases and sales.

Second Defense

The option agreement alleged in Paragraph VI of the complaint was one of a series of 16 such

agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employment of plaintiff at the salaries that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff. [32] Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the execution of such option agreement. Defendant has been continuously employed by plaintiff since prior to the date of said agreement and to the date of this answer, and has remained in such employment in reliance on the benefits of said option agreement in affording defendant additional compensation. At the time such option agreement was entered into the reasonable market value of the shares of plaintiff was less than $5.

Third Defense

During the period alleged in plaintiff's complaint, defendant and his said wife, due to their financial circumstances, were unable to purchase shares under the option agreement, and thereby to secure additional compensation or an interest in plaintiff, without selling a portion of such shares substantially at the same time. In addition, defendant and his said wife were taxable at the time of the execution of any such option upon the difference between the option price and the market value of the shares so purchased on any such date. Defendant and his said wife were unable to purchase any shares under such option and to pay the

tax thereon without, at substantially the same time, selling a portion of said shares.

Fourth Defense

In the purchases and sales of the stock of plaintiff by defendant during the period alleged in the complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director.

Fifth Defense

The value of plaintiff's stock purchased by defendant gradually appreciated between the time of the execution of the option agreement and the dates of the purchases and sales by defendant. That the values of the stock on the date of such purchases were as follows:

Date	No. of Shs.	Cost	Market Value
April 8, 1949	300	$1,500	$3,243.75
April 11, 1949	300	1,500	3,112.50
June 8, 1949	400	2,000	4,300.00
August 18, 1949	1000	5,000	19,625.00

Sixth Defense

Defendant made such purchases and sales under arrangements made by, and with the approval of, plaintiff and in reliance upon plaintiff's assurance that plaintiff claimed no interest in any profits arising from said transactions or otherwise. That defendant would not have purchased or sold said stock and would not have been able to purchase

said stock except in reliance upon such assurances and such arrangements. Plaintiff is thereby estopped from asserting any interest in and to any profits realized from said transactions or other interest in any way connected with said transactions.

Wherefore defendant prays that plaintiff take nothing by its complaint and for judgment against plaintiff for defendant's costs incurred in this proceeding.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed April 30, 1951. [34]

[Title of District Court and Cause.]

No. 12,583-HW—Civil

PRE-TRIAL STIPULATION

A. Stipulation of Facts

It Is Hereby Stipulated and Agreed by Consolidated Engineering Corporation, plaintiff in the above-entitled action, by and through Latham & Watkins, attorneys for plaintiff, and Hugh F. Colvin, defendant in said action, by and through Willis Sargent and Sidney H. Wyse, attorneys for defendant, that the facts hereafter stated in this stipulation shall be deemed true for all purposes of said action.

It Is Further Stipulated and Agreed that this stipulation is entered into by and between the parties without prejudice to the right of either party to object to the materiality or relevancy of any fact herein stated under the issues raised by any of the pleadings in this action. [36]

I.

On August 21, 1946, plaintiff and defendant executed an agreement in writing, entitled "Option Agreement." A full, true and correct copy of said agreement is annexed to this stipulation as Exhibit A.

II.

Defendant entered into the following transactions involving the acquisition of shares:

(a) On March 31, 1949, defendant executed a notice stating that defendant elected to purchase 300 shares under the option agreement. On April 8, 1949, California Trust Company issued certificates Nos. 2215 through 2217, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 8, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(b) On April 7, 1949, defendant executed a notice stating that defendant elected to purchase 300 shares under the option agreement. On April 11, 1949, California Trust Company issued certificates Nos. 2225 through 2227, each for 100 shares,

representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 11, 1949, defendant caused to be paid to California Trust Company the sum of $1,500, which sum was credited by California Trust Company to the account of plaintiff.

(c) On May 20, 1949, defendant executed a notice of his election to purchase 400 shares under the option agreement. On June 8, 1949, California Trust Company issued certificates Nos. 2611 through 2614, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On May 20, 1949, defendant caused to be [37] paid to California Trust Company the sum of $2,000, which sum was credited by California Trust Company to the account of plaintiff.

(d) On July 22, 1949, defendant executed a notice stating that defendant elected to purchase, as of August 1, 1949, the accrual date under the option agreement, 1,000 shares under the option agreement. On August 18, 1949, California Trust Company issued certificates Nos. 2778 through 2787, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On August 18, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(e) On August 9, 1950, defendant executed a notice stating that defendant elected to purchase

1,000 shares under the option agreement. On September 1, 1950, California Trust Company issued certificates Nos. 4068 through 4077, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On September 1, 1950, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

III.

Defendant entered into the following transactions involving sales of shares of plaintiff:

(a) On March 25, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $786.93, and delivered to the broker certificate No. 2215, for 100 shares, to effect the sale.

(b) On March 28, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,672.86, and delivered to the broker certificates Nos. 2216 and 2217, each for 100 shares, to effect the sale. [38]

(c) On April 6, 1949, defendant sold 300 shares through Hopkins, Harbach & Co., a member of the Los Angeles Stock Exchange, for $2,769.16, and delivered to the broker certificates Nos. 2225 through 2227, each for 100 shares, to effect the sale.

(d) On September 29, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,382.92,

and delivered to the broker certificate No. 2778, for 100 shares, to effect the sale.

(e) On January 9, 1950, defendant sold 100 shares for $2,427.64, and delivered to the broker certificate No. 2611, for 100 shares, to effect the sale.

(f) On August 7, 1950, defendant sold 170 shares through Merrill, Lynch, Pierce, Fenner and Beane, a member of the Los Angeles Stock Exchange, for $3,651.50, and delivered to the broker certificates Nos. 2782 and 2783, to effect the sale.

IV.

The range of prices at which shares of the plaintiff were bought and sold on the Los Angeles Stock Exchange, the bid and asked prices at which the shares were quoted on the Exchange on the days when no sales were effected, and the midpoint of such range or bid and asked prices were as follows, on the following listed dates:

Date	High	Low	Bid	Asked	Midpoint
8/14/47	Not Listed		3½	4	3¾
7/30/48*	6¾	6¾			6¾
8/ 2/48**	No Sales		6⅝	6⅞	6¾
3/31/49	No Sales		8⅜	8¾	8.56
4/ 7/49	10⅞	10½			10.68
4/ 8/49	10⅞	10¾			10.81
4/11/49	10½	10¼			10⅜
5/20/49	13¾	13¾			13¾
6/ 8/49	10¾	10½			10⅜
8/ 1/49	13⅞	13¾			13.81
8/18/49	14	14			14
8/ 1/50	21⅞	21½			21.69
8/19/50	Closed (Saturday)				
9/ 1/50	No Sales		19½	19⅝	19.56

* July 31, 1948—no sales.

** August 1, 1948, was Sunday.

V.

The dates on which the midpoint between the highest and lowest sales on the Los Angeles Stock Exchange was the lowest, during the following designated periods, and the high and low prices, and the midpoints on such dates, were as follows:

Period	Date	High	Low	Midpoint
9/27/48 - 3/25/49	1/ 5/49	6¾	6⅝	6.69
9/30/48 - 3/28/49	1/ 5/49	6¾	6⅝	6.69
10/ 8/48 - 4/ 6/49	1/ 5/49	6¾	6⅝	6.69
3/25/49 - 9/23/49	3/25/49	8	8	8
3/28/49 - 9/26/49	3/28/49	8½	8¼	8⅜
3/31/49 - 9/29/49	4/ 1/49	8½	8½	8½
4/ 6/49 - 10/ 4/49	4/ 6/49	10⅞	9¼	9.41
7/11/49 - 1/ 9/50	7/12/49	12	12	12
9/29/49 - 3/27/50	10/ 1/49	13½	13½	13½
1/ 9/50 - 7/ 7/50	3/27/50	19¼	19¼	19¼
2/ 9/50 - 9/ 7/50	7/18/50	19½	19⅛	19.31
8/ 7/50 - 2/ 5/51	12/ 4/50	19	19	19

VI.

At all times mentioned in this stipulation defendant and Audy Lou Colvin were, and now are, husband and wife, and were, and now are, residents of the State of California. Any reference in this stipulation to the acquisition or sale of the shares of plaintiff by defendant shall be without prejudice to any claim of defendant that [40] the shares acquired were acquired with, and were, community property of defendant and Audy Lou Colvin, his wife, and that the proceeds of the sales of the shares were, and are, community property of defendant and Audy Lou Colvin.

VII.

The stock of the corporation was listed on the Los Angeles Stock Exchange, a national securities exchange, on April 23, 1948, and has been so listed at all times subsequent thereto. Prior to said date said stock was not listed on any national securities exchange.

VIII.

The Option Agreement between plaintiff and defendant was one of a series of sixteen such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employ of plaintiff at the salary that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff.

IX.

Defendant has been continuously employed by plaintiff since and prior to the time of said Option Agreement, and to the date of this stipulation.

X.

At the time said Option Agreement was entered into the fair market value of the shares of plaintiff was less than $5.00 per share.

XI.

There is attached hereto as Exhibit "B" a true and correct copy of the permit issued by the Division of Corporations of the State of California on July 23, 1946, authorizing plaintiff to enter into the option agreement with defendant and to sell shares pursuant thereto. [41]

XII.

Between March 25, 1949, and August 9, 1950, plaintiff had a minimum of 176,790 shares of its common capital stock outstanding, of which, during the same period, defendant at no time owned more than 1,420 shares.

XIII.

During the periods here involved Audy Lou Colvin owned no shares of stock of plaintiff except whatever community property interest she may have possessed in the shares of stock standing in the name of defendant.

XIV.

At no time has Audy Lou Colvin been either an officer or a director of plaintiff.

B. Statement of Facts Which Parties Are Unable to Concede

Plaintiff is unable to concede the following facts, but does not, as presently advised, intend to contest by evidence to the contrary:

(a) That the options held in the names of the defendants, any and all shares of stock of plaintiff acquired in the name of defendant, and all proceeds arising from the exercise of any such option or from the sale or disposition of any such shares were at all times, and now are, the community property of the defendants and their respective spouses;

(b) That defendants were induced to remain as employees of plaintiff by reason of the execution of the option agreements, or that they remained in

such employment in reliance upon the benefits of said option agreements;

(c) That the defendants and their wives were unable to purchase shares under the option agreements, or to pay tax accruing upon such purchases, without selling a portion of such shares substantially at the same time. [42]

C. Statement of Plaintiff's Objections to Admissibility of Stipulated Facts

Plaintiff reserves the following objections to the admissibility in evidence of the following facts:

(a) The facts set forth in Paragraph VIII herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

(b) The facts set forth in Paragraph X herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Dated May 25, 1951. [43]

EXHIBIT A

Option Agreement

This Option Agreement made and entered into this 14th day of August, 1947, but effective as of August 1, 1947, by and between Consolidated Engineering Corporation, a California corporation, hereinafter referred to as Consolidated, and Hugh Colvin, a resident of Pasadena, California, hereinafter called Colvin.

Witnesseth

That Consolidated does hereby grant to Colvin an option to purchase a total of not to exceed 5,000 shares of its common capital stock of the par value of $1.00 per share upon the following terms and conditions:

(1) The total number of shares, option to purchase which is hereby granted to Colvin, is 5,000.

(2) The term of this agreement shall commence on August 1, 1947, and shall expire on August 31, 1952, unless prior to said time this agreement has otherwise terminated.

(3) The option to purchase hereby given shall be exercisable only in the following manner:

(1) For the first year of this agreement, Colvin shall have an option to purchase up to but not to exceed 1,000 shares, which option shall be exercisable on or after August 1, 1948;

(b) For the second year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1949;

(c) For the third year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1950; [44]

(d) For the fourth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1951;

(e) For the fifth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after August 1, 1952.

(4) All of the options hereby given, and particularly described in paragraph (3) above shall, unless this agreement is sooner terminated, expire on August 31, 1952. The exercise by Colvin of his option in part only as to shares for any year shall not be deemed to limit in any way his right to exercise his option as to the balance of said shares so long as his option is in effect and this agreement has not been terminated.

(5) If he shall elect to exercise the options hereby given, either in whole or in part, and whether

at one time or from time to time, Colvin shall forthwith give written notice thereof to Consolidated. Such notice shall be in writing, addressed to Consolidated, for the attention of the Secretary, and sent by registered mail, postage prepaid. Said notice, to be effective shall specify the number of shares as to which the option is exercised, and the denomination and the name or names in which the certificate or certificates evidencing the shares shall be issued, and shall be accompanied by certified or cashier's check for the full amount of the purchase price of the shares to be issued. Upon receipt of such notice, and the purchase price of the shares to be issued, Consolidated will issue, or cause to be issued, certificates evidencing the shares so purchased.

(6) The price at which any of the shares subject to the options hereby granted are to be sold is $5.00 per share.

(7) This agreement shall automatically terminate prior to August 31, 1952, upon the happening of any of the following events:

(a) The exercise by Colvin of all of the options hereby granted and the completion of payment for and delivery of the shares as to which the options have been exercised. [45]

(b) The death of Colvin.

(c) Termination of Colvin's employment with Consolidated, whether for cause or otherwise, and whether voluntary or involuntary insofar as either party is concerned.

(d) Any attempt by Colvin to assign all or any part of his rights hereunder.

(e) The mutual agreement of the parties hereto. Upon termination hereof, any options hereby granted and then unexercised shall forthwith terminate and be of no further force or effect.

(8) It is understood and agreed that this agreement shall not become effective for any purpose unless and until a proper permit has been obtained from the Commissioner of Corporations of the State of California (a) authorizing the granting by Consolidated of the options hereby given, and (b) authorizing the issuance of the stock of Consolidated pursuant to the exercise of said options.

If at any time the permit or permits so obtained shall be revoked, or shall expire for reasons not within the control of Consolidated, then in such event Consolidated shall be relieved of any further obligation to issue any of its shares hereunder.

(9) If at any time subsequent to the effective date hereof Consolidated shall declare a stock dividend on its outstanding common stock, or shall make effective a stock-split, it is agreed that Colvin's option to purchase shall be adjusted to give effect thereto. By way of illustration of the foregoing, if Consolidated should hereafter declare a stock dividend of one common share on each common share outstanding, Colvin's option thereafter shall be to purchase two shares for each share subject to option

prior to the dividend, and the price for the two shares shall be $5.00, or $2.50 per share.

(10) This agreement shall not be assignable either in whole or in part by Colvin.

(11) This agreement shall inure to the benefit of and be binding upon the successors and/or assigns of Consolidated. [46]

(12) Time is of the essence hereof.

In Witness Whereof, we have hereunto set our hands as of the day and year first above written.

CONSOLIDATED ENGINEERING CORPORATION.

By /s/ PHILIP S. FOGG,

By /s/ JAMES B. CHRISTIE,

/s/ HUGH F. COLVIN. [47]

EXHIBIT B

Before the Department of Investment, Division of Corporations of the State of California

In the matter of the application of "CONSOLIDATED ENGINEERING CORPORATION" for a permit authorizing it to sell and issue its securities

PERMIT

File No. 65446LA
Receipt No. LA A44173

This Permit Does Not Constitute a Recommendation Or Endorsement of the Securities Permitted to Be Issued, But Is Permissive Only

"Consolidated Engineering Corporation"

a California corporation, is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to Hugh Colvin an option agreement substantially in the form and tenor of the copy contained in the application filed with the Commissioner of Corporations August 6, 1947, and pursuant thereto to sell and issue to him an aggregate of not to exceed 5,000 of its shares, at and for the price of $5.00 per share, cash, lawful money of the United States, for the uses and purposes recited in said application, and so as to net applicant the full amount of the selling price thereof. This permit is issued upon the following condition:

(a) That unless revoked or suspended, or renewed upon application filed on or before the

date of expiration specified in this condition, all authority to sell securities under paragraph 1 of this permit shall terminate and [48] expire on the 31st day of August, 1952.

Dated Los Angeles, California, August 12, 1947.

EDWIN M. DAUGHERTY,
Commissioner of
Corporations.

By /s/ J. A. HAHN,
Assistant Commissioner.

[Endorsed]: Filed May 28, 1951. [49]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,584-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

COMPLAINT FOR RECOVERY OF PROFITS REALIZED BY DEALINGS IN THE STOCK OF PLAINTIFF CORPORATION

Plaintiff, Consolidated Engineering Corporation, doing business at 620 North Lake Avenue, Pasadena, California, brings this, its complaint, against the

above-named defendant, who is a resident of the County of Los Angeles, and alleges as follows:

I.

This action arises under Section 16(b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78p (b) as hereinafter more fully appears. Exclusive jurisdiction of actions arising under Section 16(b) of the Act is conferred upon the Federal Courts by Section 27 of the Act, U.S.C.A., Title 15, Section 78 aa. The amount in controversy exceeds Three Thousand Dollars ($3,000.00).

II.

The defendant, James R. Bradburn, was an officer of plaintiff, namely a Vice-President, throughout the period during which the [50] transactions hereinafter referred to took place.

III.

The stock of plaintiff consists of one class only, namely common stock. The common stock of the plaintiff is listed upon the Los Angeles Stock Exchange, a national securities exchange, and was so listed throughout the period during which the transactions hereinafter referred to took place.

IV.

Between March 24, 1949, and April 25, 1950, in transactions occurring within periods of less than six (6) months, the defendant made purchases and sales and sales and purchases of stock issued by the plaintiff, as specifically described in Paragraph V. At the time of each of said purchases and sales and sales and purchases the defendant was the bene-

ficial owner of the stock. From these transactions the defendant realized a profit.

V.

Between March 24, 1949, and April 25, 1950, the defendant made the following purchases and sales and sales and purchases of common stock issued by plaintiff:

Purchases			Sales		
Date	No. of Shares	Amount Paid	Date	No. of Shares	Amount Received
3/28/49	1000	$5,000.00	3/24/49	200	$1,573.86
4/ 2/49	1000	5,000.00	3/28/49	200	1,648.10
9/ 1/49	260	1,300.00	3/29/49	500	4,064.34
9/23/49	200	1,000.00	4/ 2/49	1000	8,983.10
4/ 7/50*	100	500.00	8/ 8/49	100	1,370.48
			9/30/49	200	2,765.84
* (1,000 shares actually purchased 4-7-50 but only 100 can be matched against sales.)			10/ 4/49	60	827.82
			12/13/49	100	2,527.13
			2/21/50	100	2,178.89
			4/25/50	100	2,104.26
Totals	2560	$12,800.00		2560	$28,043.82

VI.

The defendant now holds, and at all times herein mentioned has held, an option agreement, effective April 18, 1946, with the plaintiff pursuant to the terms of which the defendant is, and has been, entitled to purchase Five Thousand (5,000) shares of plaintiff's stock, original issue, at Five Dollars ($5.00) per share. The option is exercisable over a period of five (5) years, but the number of shares purchased in any one year under the option agreement is not to exceed one-fifth of the total number

of shares subject to the option. The option terminates at death, is not transferable, and is conditioned upon continuation of employment. All purchases by the defendant hereinabove referred to in Paragraph IV and set forth in Paragraph V were made at Five Dollars ($5.00) per share pursuant to this option agreement with the plaintiff.

VII.

From the purchases and sales and sales and purchases, as set out in Paragraph V, of Two Thousand Five Hundred Sixty (2,560) shares of stock issued by the plaintiff, the defendant has realized a profit of Fifteen Thousand Two Hundred Forty-Three Dollars Eighty-Two Cents ($15,243.82). This profit inures to and is recoverable by the plaintiff under the provisions of Section 16 (b) of the Securities Exchange Act of 1934, U.S.C.A. Title 15, Section 78 p(b).

Wherefore, the plaintiff prays for judgment against the defendant as follows:

1. For damages in the amount of Fifteen Thousand Two Hundred Forty-Three Dollars Eighty-Two Cents ($15,243.82).

2. For its costs of suit herein.

3. For such other and further relief as may be proper in the premises.

LATHAM & WATKINS

By /s/ AUSTIN H. PECK JR.,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 21, 1950 [52]

[Title of District Court and Cause.]

No. 12,584-BH—Civil

AMENDED ANSWER

Defendant, James R. Bradburn, in answer to the complaint of plaintiff, Consolidated Engineering Corporation, avers:

First Defense

I.

Answering Paragraph IV of the complaint, defendant admits that defendant made purchases and sales of stock of plaintiff during the period therein stated, in the manner and for the considerations hereinafter averred, and not otherwise. Defendant admits that at the time of each of said purchases and sales defendant was the beneficial owner of the stock, to the extent of one-half thereof, and no more, and in this respect defendant alleges that at all times mentioned in plaintiff's complaint, defendant and King Turnbull Bradburn were, and now are, husband and wife, residing in the State of California, and that the options held in the name of defendant, any and all shares of stock of plaintiff acquired in the name of defendant and all proceeds arising from the exercise of any such option or from the sale or other disposition of any [54] such shares were at all times, and now are, the community property of defendant and said King Turnbull Bradburn. Further answering said paragraph, defendant denies that defendant and his said wife realized any profit from these transactions.

II.

Answering Paragraph V of the complaint, defendant admits that defendant sold a total of 2560 shares of plaintiff's stock, in the quantities, on the dates and for the price therein alleged.

Further answering Paragraph V, defendant denies that defendant made the purchases of shares therein alleged during the period therein stated, but admits that defendant made the following purchases of shares of plaintiff's stock, in the quantities, on the dates and for the cash consideration herein stated, as follows:

Date	No. of Shares	Amount Paid
April 6, 1949	1000	$5,000
April 13, 1949	1000	5,000
September 3, 1949	260	.....
March 6, 1950	1000	5,000

With respect to the purchase of 260 shares of plaintiff's stock on September 3, 1949, defendant acquired said stock by the conversion of $1300 face amount of plaintiff's Series A, 6% Convertible Debentures, dated October 1, 1947, purchased by defendant on November 8, 1947, at a cost of $1300.

III.

Answering Paragraph VI of the complaint, defendant admits the allegations thereof except that defendant denies that said option was exercisable during any one year only as to one-fifth of the total number of shares subject thereto.

IV.

Answering Paragraph VII of the complaint, defendant denies that defendant and his said wife have realized any profit by reason of said purchases and sales.

Second Defense

The option agreement alleged in Paragraph VI of the complaint was one [55] of a series of 16 such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employment of plaintiff at the salaries that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the execution of such option agreement. Defendant has been continuously employed by plaintiff since prior to the date of said agreement and to the date of this answer, and has remained in such employment in reliance on the benefits of said option agreement in affording defendant additional compensation. At the time such option agreement was entered into the reasonable market value of the shares of plaintiff was less than $5.

Third Defense

During the period alleged in plaintiff's complaint, defendant and his said wife, due to their financial circumstances, were unable to purchase shares under the option agreement, and thereby to secure additional compensation or an interest

in plaintiff, without selling a portion of such shares substantially at the same time. In addition, defendant and his said wife were taxable at the time of the execution of any such option upon the difference between the option price and the market value of the shares so purchased on any such date. Defendant and his said wife were unable to purchase any shares under such option and to pay the tax thereon without, at substantially the same time, selling a portion of said shares.

Fourth Defense

In the purchases and sales of the stock of plaintiff by defendant during the period alleged in the complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director.

Fifth Defense

The value of plaintiff's stock purchased by defendant gradually appreciated between the time of the execution of the option agreement and the dates of the purchases and sales by defendant. That the values of the stock [56] on the date of such purchases, were as follows:

Date	No. of Shs.	Cost	Market Value
April 6, 1949	1000	$5,000	$10,062.50
April 13, 1949	1000	5,000	10,375.00
September 3, 1949	260	1,300	3,526.25
March 6, 1950	1000	5,000	21,250.00

Sixth Defense

Defendant made such purchases and sales under arrangements made by, and with the approval of, plaintiff and in reliance upon plaintiff's assurance that plaintiff claimed no interest in any profits arising from said transactions or otherwise. That defendant would not have purchased or sold said stock and would not have been able to purchase said stock except in reliance upon such assurances and such arrangements. Plaintiff is thereby estopped from asserting any interest in and to any profits realized from said transactions or other interest in any way connected with said transactions.

Wherefore defendant prays that plaintiff take nothing by its complaint and for judgment against plaintiff for defendant's costs incurred in this proceeding.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 30, 1951. [57]

[Title of District Court and Cause.]

No. 12,584-HW—Civil

PRE-TRIAL STIPULATION

A. Stipulation of Facts

It Is Hereby Stipulated and Agreed by Consolidated Engineering Corporation, plaintiff in the above-entitled action, by and through Latham & Watkins, attorneys for plaintiff, and James R. Bradburn, defendant in said action, by and through Willis Sargent and Sidney H. Wyse, attorneys for defendant, that the facts hereafter stated in this stipulation shall be deemed true for all purposes of said action.

It Is Further Stipulated and Agreed that this stipulation is entered into by and between the parties without prejudice to the right of either party to object to the materiality or relevancy of any fact herein stated under the issues raised by any of the pleadings in this action.

I.

On August 21, 1946, plaintiff and defendant executed an [59] agreement in writing, entitled "Option Agreement." A full, true and correct copy of said agreement is annexed to this stipulation as Exhibit "A."

II.

Defendant entered into the following transactions involving the acquisition of shares of plaintiff:

(a) On June 30, 1947, defendant purchased 200

shares for $550. Defendant received certificates Nos. 1343 and 1344, each for 100 shares, representing the shares so purchased.

(b) On August 30, 1949, defendant delivered to California Trust Company, transfer agent of plaintiff, Series A, 6% convertible debentures, dated October 1, 1947, in the face value of $1,300, with instructions to cancel the debentures and to issue 260 shares therefor. The debentures had been purchased by defendant on November 8, 1947, at a cost of $1,300. On September 3, 1949, California Trust Company delivered to defendant the following certificates, representing the shares so acquired in exchange for the debentures: No. 2878 for 100 shares, No. 2879 for 100 shares, No. L936 for 50 shares and No. L937 for 10 shares.

(c) On November 21, 1947, defendant purchased 100 shares for $434.80. Defendant received certificate No. 1465, representing the shares so purchased.

(d) On March 28, 1949, defendant executed a notice stating that defendant elected to purchase 1,000 shares under the option agreement. On April 6, 1949, California Trust Company issued certificates Nos. 2203 through 2212, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On April 6, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(e) On April 2, 1949, defendant executed a no-

tice of his election to purchase 1,000 shares under the option agreement. On [60] April 11, 1949, California Trust Company issued certificates Nos. 2228 through 2237, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement that the shares had been so issued. On April 11, 1949, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(f) On September 23, 1949, defendant executed a notice of his election to purchase 500 shares under the option agreement. On January 5, 1950, he executed a notice of his election to purchase an additional 500 shares under the option agreement. On March 6, 1950, California Trust Company issued certificates Nos. 3502 through 3511, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On March 20, 1950, defendant caused to be paid to California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

(g) On April 7, 1950, defendant executed a notice of his election to purchase 1,000 shares under the option agreement. On May 6, 1950, California Trust company issued certificates Nos. 3693 through 3702, each for 100 shares, representing the shares so purchased, and endorsed on the option agreement a statement that the shares had been so issued. On May 8, 1950, defendant caused to be paid to

California Trust Company the sum of $5,000, which sum was credited by California Trust Company to the account of plaintiff.

III.

Defendant entered into the following transactions involving sales of shares of plaintiff:

(a) On March 24, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,573.86, and delivered to the broker certificates Nos. 1343 and 1465, each for 100 shares, to effect the sale.

(b) On March 28, 1949, defendant sold 200 shares through [61] Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,648.10, and delivered to the broker certificates Nos. 2208 and 2209, each for 100 shares, to effect the sale.

(c) On March 29, 1949, defendant sold 300 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,509.29, and delivered to the broker certificates Nos. 2204 through 2206, each for 100 shares, to effect the sale.

(d) On March 29, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,623.36, and delivered to the broker certificates Nos. 2203 and 2207, each for 100 shares, to effect the sale.

(e) On April 2, 1949, defendant sold 500 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $4,429.66, and delivered to the broker certificates Nos. 2228

through 2232, each for 100 shares, to effect the sale.

(f) On April 2, 1949, defendant sold 500 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $4,553.45, and delivered to the broker certificates Nos. 2233 through 2237, each for 100 shares, to effect the sale.

(g) On August 8, 1949, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $1,370.48, and delivered to the broker certificate No. 1344, for 100 shares, to effect the sale.

(h) On September 30, 1949, defendant sold 200 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,765.84, and delivered to the broker certificates Nos. 2278 and 2279, each for 100 shares, to effect the sale.

(i) On October 4, 1949, defendant sold 60 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $827.87, and delivered to the broker certificates No. L936 for 50 shares and No. L937 for 10 shares, to effect the sale.

(j) On December 13, 1949, defendant sold 100 shares through [62] Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,527.13, and delivered to the broker certificate No. 2210 for 100 shares to effect the sale.

(k) On February 21, 1950, defendant sold 100 shares through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,178.89, and delivered to the broker certificate No. 2211 for 100 shares to effect the sale.

(l) On April 25, 1950, defendant sold 100 shares

through Hopkins, Harbach & Co., member of the Los Angeles Stock Exchange, for $2,104.26, and delivered to the broker certificate No. 2212 for 100 shares to effect the sale.

IV.

The range of prices at which shares of the plaintiff were bought and sold on the Los Angeles Stock Exchange, the bid and asked prices at which the shares were quoted on the Exchange on the days when no sales were effected, and the midpoint of such range or bid and asked prices were as follows, on the following listed dates:

Date		High	Low	Bid	Asked	Midpoint
8/21/46	Not Listed			4⅜	4⅞	4⅝
4/17/47	Not Listed			2¾	3¼	3
4/17/48	Not Listed			5⅛	5⅝	5⅜
3/28/49		8½	8¼			8⅜
4/ 2/49		9¼	8¾			9
4/ 6/49		9⅛	9⅛			9⅛
4/11/49		10½	10¼			10⅜
4/16/49	(Saturday)*	No Sales		10¾	10⅞	10.81
4/18/49	(Monday)	11	10¾			10⅞
8/30/49				13½	13¾	13⅝
9/ 2/49**	No Sales			13⅜	13¾	13.5625
9/ 6/49**	No Sales			13⅛	13⅝	13⅜
9/23/49		14	13⅞			13.9375
1/ 5/50				25½	26	25¾
3/ 2/50		21½	21½			21½
3/ 6/50				20¾	21½	21.125
3/20/50				20¾	21⅝	21.1875
4/ 7/50	Closed—Good Friday					
4/17/50		20	20			20
5/ 6/50		25	24½			24¾
5/ 8/50		25	25			25

* April 17, 1949, was Sunday.

** Exchange closed Saturday, September 3, 1949, and Monday, September 4, 1949.

V.

The dates on which the midpoint between the highest and lowest sales on the Los Angeles Stock Exchange was the lowest, during the following designated periods, and the high and low prices, and the midpoints on such dates, were as follows:

Period	Date	High	Low	Midpoint
9/26/48 - 3/24/49	1/ 5/49	6¾	6⅝	6.6875
9/30/48 - 3/28/49	1/ 5/49	6¾	6⅝	6.6875
10/ 1/48 - 3/29/49	1/ 5/49	6¾	6⅝	6.6875
10/ 4/48 - 4/ 2/49	1/ 5/49	6¾	6⅝	6.6875
2/10/49 - 8/ 8/49	2/11/49	7	7	7
3/24/49 - 9/22/49	3/24/49	8	7¾	7⅞
3/28/49 - 9/26/49	3/28/49	8½	8¼	8⅜
3/29/49 - 9/27/49	4/ 1/49	8½	8½	8½
4/ 1/49 - 9/30/49	4/ 1/49	8½	8½	8½
4/ 2/49 - 9/30/49	4/ 2/49	9¼	8¾	9
4/ 6/49 - 10/ 4/49	4/ 6/49	9⅛	9⅛	9⅛
6/15/49 - 12/13/49	6/15/49	10⅞	10⅞	10⅞
8/ 8/49 - 2/ 6/50	9/12/49	13⅛	13⅛	13⅛
8/23/49 - 2/21/50	9/12/49	13⅛	13⅛	13⅛
9/30/49 - 3/28/50	10/ 1/49	13½	13½	13½
10/ 4/49 - 4/ 2/50	10/ 4/49	14½	13⅞	14.1875
10/27/49 - 4/25/50	11/ 6/49	17	17	17
12/13/49 - 6/11/50	3/27/50	19¼	19¼	19¼
2/21/50 - 8/19/50	7/18/50	19½	19⅛	19.3125
4/25/50 - 10/23/50	7/18/50	19½	19⅛	19.3125

VI.

At all times mentioned in this stipulation defendant and King Turnbull Bradburn were, and now are, husband and wife, and were, and now are, residents of the State of California. Any reference in this stipulation to the acquisition or sale of the shares of plaintiff by defendant shall be without prejudice to any claim of defendant that

the shares acquired were acquired with, and were, community property of defendant and King Turnbull Bradburn, his wife, and that the proceeds of the sales of the shares were, and are, community property of defendant and King Turnbull Bradburn.

VII.

The stock of the corporation was listed on the Los Angeles Stock Exchange, a national securities exchange, on April 23, 1948, and has been so listed at all times subsequent thereto. Prior to said date said stock was not listed on any national securities exchange.

VIII.

The Option Agreement between plaintiff and defendant was one of a series of sixteen such agreements between plaintiff and a group of plaintiff's key employees, executed as an incentive plan to encourage said employees to remain in the employ of plaintiff at the salary that plaintiff was then able to pay and to use their best efforts in the interest of plaintiff.

IX.

Defendant has been continuously employed by plaintiff since and prior to the time of said Option Agreement, and to the date of [65] this stipulation.

X.

At the time said Option Agreement was entered into the fair market value of the shares of plaintiff was less than $5.00 per share.

XI.

There is attached hereto as Exhibit "B" a true and correct copy of the permit issued by the Division of Corporations of the State of California on July 23, 1946, authorizing plaintiff to enter into the option agreement with defendant and to sell shares pursuant thereto.

XII.

Between March 24, 1949, and April 25, 1950, plaintiff had a minimum of 176,790 shares of its common capital stock outstanding, of which, during the same period, defendant at no time owned more than 2,100 shares.

XIII.

During the periods here involved King Turnbull Bradburn owned no shares of stock of plaintiff except whatever community property interest she may have possessed in the shares of stock standing in the name of defendant.

XIV.

At no time has King Turnbull Bradburn been either an officer or a director of plaintiff.

B. Statement of Facts Which Parties Are Unable to Concede

Plaintiff is unable to concede the following facts, but does not, as presently advised, intend to contest by evidence to the contrary:

(a) That the options held in the names of the defendants, any and all shares of stock of plaintiff

acquired in the name of defendants, and all proceeds arising from the exercise of any such option or from the sale or disposition of any such [66] shares were at all times, and now are, the community property of the defendants and their respective spouses;

(b) That defendants were induced to remain as employees of plaintiff by reason of the execution of the option agreements, or that they remained in such employment in reliance upon the benefits of said option agreements;

(c) That the defendants and their wives were unable to purchase shares under the option agreements, or to pay tax accruing upon such purchases, without selling a portion of such shares substantially at the same time.

C. Statement of Plaintiff's Objections to Admissibility of Stipulated Facts

Plaintiff reserves the following objections to the admissibility in evidence of the following facts:

(a) The facts set forth in Paragraph VIII herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Section 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

(b) The facts set forth in Paragraph X herein, on the ground that said facts are irrelevant and immaterial, and, under decided cases, have no bearing upon the determination of liability under Sec-

tion 16(b) of the Securities Exchange Act of 1934 or on the amount of damages recoverable under said section.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

WILLIS SARGENT and
SIDNEY H. WYSE,

By /s/ SIDNEY H. WYSE,
Attorneys for Defendant.

Dated May 25, 1951. [67]

EXHIBIT A

Option Agreement

This Option Agreement made and entered into this 21st day of August, 1946, but effective as of April 18, 1946, by and between Consolidated Engineering Corporation, a California corporation, hereinafter referred to as Consolidated, and James R. Bradburn, a resident of Pasadena, California, hereinafter called Bradburn.

Witnesseth

That Consolidated does hereby grant to Bradburn an option to purchase a total of not to exceed 5,000 shares of its common capital stock of the par value of $1.00 per share upon the following terms and conditions:

(1) The total number of shares, option to purchase which is hereby granted to Bradburn, is 5,000.

(2) The term of this agreement shall commence on April 18, 1946, and shall expire on July 15, 1951, unless prior to said time this agreement has otherwise terminated.

(3) The option to purchase hereby given shall be exercisable only in the following manner:

(a) For the first year of this agreement, Bradburn shall have an option to purchase up to but not to exceed 1,000 shares, which option shall be exercisable on or after April 17, 1947;

(b) For the second year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1948;

(c) For the third year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable on or after April 17, 1949;

(d) For the fourth year of this agreement, up to but not to exceed an adidtional 1,000 shares, which option shall be exercisable on or after April 17, 1950;

(e) For the fifth year of this agreement, up to but not to exceed an additional 1,000 shares, which option shall be exercisable or on after April 17, 1951. [68]

(4) All of the options hereby given, and par-

ticularly described in paragraph (3) above, shall, unless this agreement is sooner terminated, expire on July 15, 1951. The exercise by Bradburn of his option in part only as to shares for any year shall not be deemed to limit in any way his right to exercise his option as to the balance of said shares so long as his option is in effect and this agreement has not been terminated.

(5) If he shall elect to exercise the options hereby given, either in whole or in part, and whether at one time or from time to time, Bradburn shall forthwith give written notice thereof to Consolidated. Such notice shall be in writing, addressed to Consolidated, for the attention of the Secretary, and sent by registered mail, postage prepaid. Said notice, to be effective, shall specify the number of shares as to which the option is exercised, and the denomination and the name or names in which the certificate or certificates evidencing the shares shall be issued, and shall be accompanied by certified or cashier's check for the full amount of the purchase price of the shares to be issued. Upon receipt of such notice, and the purchase price of the shares to be issued, Consolidated will issue, or cause to be issued, certificates evidencing the shares so purchased.

(6) The price at which any of the shares subject to the options hereby granted are to be sold is $5.00 per share.

(7) This agreement shall automatically termi-

nate prior to July 15, 1951, upon the happening of any of the following events:

(a) The exercise by Bradburn of all of the options hereby granted and the completion of payment for and delivery of the shares as to which the options have been exercised.

(b) The death of Bradburn.

(c) Termination of Bradburn's employment with Consolidated, whether for cause or otherwise, and whether voluntary or involuntary insofar as either party is concerned.

(d) Any attempt by Bradburn to assign all or any part of his rights hereunder. [69]

(e) The mutual agreement of the parties hereto. Upon termination hereof, any options hereby granted and then unexercised shall forthwith terminate and be of no further force or effect.

(8) It is understood and agreed that this agreement shall not become effective for any purpose unless and until a proper permit has been obtained from the Commissioner of Corporations of the State of California (a) authorizing the granting by Consolidated of the options hereby given, and (b) authorizing the issuance of the stock of Consolidated pursuant to the exercise of said options.

If at any time the permit or permits so obtained shall be revoked, or shall expire for reasons not within the control of Consolidated, then in such event Consolidated shall be relieved of any further obligation to issue any of its shares hereunder.

(9) If at any time subsequent to the effective date hereof Consolidated shall declare a stock dividend on its outstanding common stock, or shall make effective a stock-split, it is agreed that Bradburn's option to purchase shall be adjusted to give effect thereto. By way of illustration of the foregoing, if Consolidated should hereafter declare a stock dividend of one common share on each common share outstanding, Bradburn's option thereafter shall be to purchase two shares for each share subject to option prior to the dividend, and the price for the two shares shall be $5.00, or $2.50 per share.

(10) This agreement shall not be assignable either in whole or in part by Bradburn.

(11) This agreement shall inure to the benefit of and be binding upon the successors and/or assigns of Consolidated.

(12) Time is of the essence hereof.

CONSOLIDATED ENGINEERING CORPORATION.

By /s/ PHILIP S. FOGG,

By /s/ JAMES B. CHRISTIE,

/s/ JAMES R. BRADBURN. [70]

EXHIBIT B

Before the Department of Investment Division of Corporations of the State of California

In the matter of the application of "CONSOLIDATED ENGINEERING CORPORATION" for a permit authorizing it to sell and issue its securities.

Permit

File No. 65446LA
Receipt No. LA A31774

This Permit Does Not Constitute a Recommendation or Endorsement of the Securities Permitted to Be Issued, but Is Permissive Only.

"Consolidated Engineering Corporation,"

a California corporation, is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to James R. Bradburn, William D. Nesbit and Paul F. Hawley option agreements substantially in the form and tenor of the copy contained in the amendment to application filed with the Commissioner of Corporations July 19, 1946, and pursuant thereto to sell and issue to them an aggregate of not to exceed 15,000 of its shares, at and for the price of $5.00 per share, cash, lawful money of the United States, for the uses and purposes recited in its application as modified by the amendment thereto, and so as to net applicant the full amount of the selling price thereof.

This permit is issued upon the following condition:

(a) That unless revoked or suspended, or renewed upon [71] application filed on or before the date of expiration specified in this condition, all authority to sell securities under paragraph 1 of this permit shall terminate and expire on the 15th day of July, 1951.

Dated: Los Angeles, California, July 23, 1946.

EDWIN M. DAUGHERTY,
Commissioner of Corporations.

By /s/ J. A. HAHN,
Assistant Commissioner.

[Endorsed]: Filed May 28, 1951. [72]

District Court of the United States, Southern District of California, Central Division

No. 12,582-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

No. 12,583-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

No. 12,584-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

OPINION

The plaintiff in the above-entitled actions had among its personnel some sixteen key employees. Being unable to pay its employees additional com-

pensation to induce them to remain in the employ of plaintiff corporation in such key positions, in lieu thereof the corporation gave to each of its sixteen key employees an option agreement, covering a period of five years, which gave to these key employees the right to purchase, at a price of $5.00 per share, certain shares of plaintiff corporation's common capital stock, having a par value of $1.00 per share.

Among other things, it was provided that the option agreement should not be effective for any purpose unless and until proper permits were obtained from the Commissioner of Corporations of the State of California, authorizing the granting by said corporation of the options and authorizing the issuance of the stock of plaintiff corporation pursuant to the provisions of said options; and the options were terminated if these employees did not remain in the service of plaintiff corporation.

Plaintiff filed petitions with the Corporation Commissioner of the State of California, asking for authority to grant the options herein mentioned and to issue the stock, if and when the options were exercised. The petitions were granted by the Corporation Commissioner.

There is nothing in this case to indicate that defendants were anything but conscientious, honest employees. They were in no respect stock market manipulators. Evidence in the case indicates that the idea of the stock option contracts originated with Philip S. Fogg, President of Consolidated Engineering Corporation, prior to the listing of

plaintiff's stock on any national exchange, as a means of retaining the services of the sixteen key men and as [74] incentive to these men to use their best efforts for the benefit of the corporation. Included among the sixteen were the three defendants in these actions, they being the only employees holding the conventional titles of officers of the corporation.

At the time the option agreements were executed they had little value. After the options acquired a value (because of the rise in value of the stock) a meeting of the optionees was called by Mr. Fogg, at which meeting the tax problem incident to the exercise of the option agreements was brought to the attention of the option holders and suggestion was made that they be exercised annually to lessen the impact of tax accruing upon exercise of an option. The fact that optionees did not have additional resources sufficient to pay the tax and purchase stock, without concurrently selling a portion of their purchased stock, was discussed at the meeting. It was then made known to the optionees that they could (through a brokerage house of which one of the directors of plaintiff corporation was a partner) effect sales of stock in order to procure funds to take up their options.

The various employees commenced taking up options, in most cases using the forms prepared or suggested by plaintiff corporation. At no time from the date of the first listing of the stock on an Exchange to the date of the filing of the actions herein did the management of the corporation, or

anyone else, issue any bulletin, circular, letter, notice or any other document, calling the employees' attention to restrictions upon them under the Securities Exchange Act relative to purchase and sale of stock within the six months' period. [75]

Subsequent to the making of the option agreements, the stock of Consolidated Engineering Corporation was listed upon a Stock Exchange and thereby came under the provisions of the Securities Exchange Act. After the purchase and sale of the stock which is the subject matter of these actions, one Pellegrina, a stockholder of plaintiff corporation, demanded that plaintiff corporation commence an action under Title 15, §78p (b), to recover for the corporation the profits realized by defendants.

It appears that Pellegrina purchased ten shares of plaintiff corporation's stock in September, 1950, and within two weeks or a month after said purchase made demand that the corporation institute suits against the defendants named in these actions. Inasmuch as Pellegrina was not a stockholder at the time the option agreements were made and had purchased only ten shares of the corporation's stock and then immediately made demand that this action be commenced, it could be assumed that after learning of the profits realized by defendants herein he made his stock purchase for the sole purpose of making demand that these actions be instituted to recover for the corporation profits realized by defendants.

Section 78p of Title 15, USCA, provides in part as follows:

> "For the purpose of preventing unfair use of information * * * any profit realized by him (beneficial owner, director or officer) from any purchase and sale * * * within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any [76] intention on the part of such beneficial owner, director, or officer in entering into such transaction. * * * Suit to recover such profit may be instituted at law or in equity * * *."

It will be noted from the above that Section 78p does not make the purchase and sale of stock unlawful or irregular. It provides only that the profits, if any, shall be recovered by the corporation. Purchase and sale of stock connected with a debt previously contracted is exempt under the statute. The purpose of this section is "preventing unfair use of information."

There is no contention here that defendants in any way unfairly used information which they might have obtained as officers, directors or beneficial owners. In fact, it is stipulated that defendants at all times acted fairly and in good faith and were not stock manipulators in the usual sense of that term. Inasmuch as option agreements had been given to sixteen employees, it would seem

entirely unfair to impose a penalty upon the three defendants herein, when it is impossible to impose a like penalty upon the other key employees who did and performed the same acts as complained of in these actions but who did not happen to have conventional titles of "corporation officials."

The sole excuse for filing these actions was that defendants were "officers" of the corporation. Defendant Bradburn was vice-president, in charge of engineering; defendant Nesbit was vice-president, in charge of production, and defendant Colvin was treasurer. Because the other employees who had similar option agreements did not happen to be officers or directors of the corporation, they could exercise their options to purchase, and sell with immunity. It would [77] be extremely inequitable to penalize these three who held options and not similarly penalize the others. According to the section, its purpose is to "prevent unfair use of information." There is no imputation that these defendants or any of them unfairly used any information obtained through their relationship to plaintiff corporation.

It would seem to the Court that, under the circumstances as outlined, the corporation should now be estopped to recover profits of a transaction which the corporation itself initiated and set up and which it (at least inferentially) assured defendants was valid. However, plaintiff corporation contends that the statute indicates a broad public policy which should not be subject to waiver or estoppel, citing to the Court Slade vs. County of

Butte, 14 Cal. App. 453, to the effect that estoppel will not be enforced, unless in those exceptional cases where equity and good conscience forbid the relief sought.

If ever there was a case where equity and good conscience "would forbid the relief sought," it seems to the Court that the necessary facts are present in these cases at bar, inasmuch as it is established that in lieu of paying additional salary to retain the services of these employees, the option agreements were given; that the transaction was initiated and handled by plaintiff corporation herein and, before consummation, had to be approved by the Corporation Commissioner of the State of California; that nothing was ever intimated to any of the defendants that if they exercised their options and purchased any stock, reselling within six months at a profit, they would have to pay to the corporation the profits realized. As all the parties were acting in good faith, deeming the agreement valid, it would seem [78] most inequitable now, after the corporation has had the benefit and advantage of the option agreements for several years, to allow plaintiff corporation to recover from defendants in accordance with the prayers of its complaints.

The purpose of the law as set forth in the statute is to prevent unfair use of information. As stated before, when the option agreements were executed the stock in question was outside the purview or scope of the Securities Exchange Act. The agree-

ments were valid in every way. There were no inhibitions of any kind. Subsequent to the making of the option agreements, the stock was listed. The listing of the stock brought it within the purview of Section 78p, Title 15 USCA; however, there is nothing to indicate that the fundamental purpose of the Act has been violated in any way.

Neither plaintiff corporation nor the Securities Exchange Commission disputes that this is an equitable proceeding; consequently, the Court is free to apply equitable doctrines coextensive with the common law and used for centuries to alleviate hardship of rules of general application which result in injustice in exceptional cases. The hard rule of the law might indicate that judgment should be rendered in favor of plaintiffs, but equity dictates that judgment should be in favor of the defendants herein.

Judgment is ordered for the defendants; Findings of Fact and Conclusions of Law to be prepared by defendants.

Dated October 10, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed October 10, 1951. [79]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Order for Pre-Trial Proceedings having been made in the above-entitled action on March 7, 1951, and, pursuant to said Order, the parties having filed a Pre-Trial Stipulation, containing a stipulation of facts, a statement of facts which the parties are unable to concede, and a statement of plaintiff's objections to admissibility of certain stipulated facts, and thereafter, and further pursuant to said Order, plaintiff having filed its Pre-Trial Memorandum of Law, its Pre-Trial Statement of Issues, its Supplemental Pre-Trial Memorandum of Law and its Second Supplemental Pre-Trial Brief, and defendant having filed his Pre-Trial Memorandum of Law, his Pre-Trial Statement of Issues, his Supplemental Pre-Trial Memorandum of Law, his Supplemental Pre-Trial Brief and his Second Supplemental Pre-Trial Brief.

And said cause having been called for pre-trial hearing on [80] July 13, 1951, and having, by order of the above-entitled Court made on said day, been set for trial on July 20, 1951, on certain limited issues of fact raised by the allegations contained in defendant's second, third, fourth and sixth defenses, contained in defendant's Amended Answer, and not stipulated or conceded by the plaintiff in the Pre-Trial Stipulation, and said matter having come on for trial on said limited issues on July 20, 1951, before the above-entitled Court, the Honorable Harry C. Westover, United States District Judge,

Judge Presiding, a jury not having been demanded by plaintiff; Latham and Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and evidence having been received on the part of the parties, and said cause having been ordered submitted for final decision by agreement of the parties upon the question of liability only, all matters with regard to damages and the measure thereof having been reserved for further proceedings, and the case having been so submitted by the respective parties;

And the Securities and Exchange Commission, by Louis Loss, Arden L. Andresen, Myer Feldman, Howard A. Judy and Hollis O. Black, its attorneys, having thereafter moved said Court for leave to file a memorandum as amicus curiae, and said motion having been granted on September 10, 1951, and the Securities and Exchange Commission having filed its Memorandum as Amicus Curiae, and defendant having filed his Memorandum in Opposition to Memorandum filed by Securities and Exchange Commission as Amicus Curiae, and the Securities and Exchange Commission having submitted an informal memorandum, in letter form, to the Judge Presiding in answer to defendant's said memorandum, and the Court being fully advised and having considered the stipulations of the parties and the testimony produced, hereby makes its Findings of Fact on the [81] issues raised between plaintiff's Complaint and defendant's

Amended Answer, such findings being limited to issues raised by the second, third, fourth and sixth defenses contained in said Amended Answer, and further makes its Conclusions of Law therefrom, as follows:

Findings of Fact

I.

On August 21, 1946, plaintiff and defendant entered into an option agreement, by the terms of which defendant was given the right to purchase shares of plaintiff at a price of five ($5.00) dollars per share, during a period of five years, so long as defendant remained an employee of plaintiff. The option agreement was one of a series of similar agreements between plaintiff and sixteen of plaintiff's key employees, all executed prior to the listing of plaintiff's stock on any national securities exchange, as an incentive to these employees to remain in the employment of plaintiff and to use their best efforts for the benefit of plaintiff, and in lieu of additional compensation which plaintiff was unable to pay. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the existence of the option agreement and, in reliance thereon, defendant has been continuously employed by plaintiff since the date of the option agreement and to and including the date of the trial of this action.

II.

The option agreement between plaintiff and defendant further provided that it should not be

effective for any purpose unless and until proper permits for the issuance of the option agreement and the shares provided for therein were obtained from the Commissioner of Corporations of the State of California. Prior to the execution of the option agreement and prior to the issuance of any shares thereunder, plaintiff applied for and obtained [82] a permit from the Commissioner of Corporations of the State of California permitting the execution of the option agreement and the issuance of the stock provided for therein.

III.

At all times up to and including the date of the option agreement the reasonable market value of plaintiff's stock was less than five ($5.00) dollars per share. During the period from the date of the option agreement to the date of the trial of this action plaintiff's operations were successful and plaintiff's stock appreciated substantially in market value. The success of plaintiff was the result, in a substantial degree, of the efforts of the 16 key employees holding option agreements, including the defendant in this case, and during this period plaintiff received the benefit of such efforts.

IV.

During the period covered by plaintiff's complaint, defendant was unable to purchase shares under the option agreement and to pay the taxes accruing upon such purchases, without concurrently selling a portion of his purchased stock, which said

facts were at all times known to plaintiff. Subsequent to the listing of plaintiff's stock on a national securities exchange and subsequent to the rise in value of plaintiff's stock to a price higher than the price contained in said option agreement, plaintiff, through its officers, suggested to said 16 key employees, including the defendant herein, that said options be exercised annually, to lessen the impact of the tax accruing upon said options, and plaintiff further made known to said key employees that they could effect sales of stock in order to procure funds to take up their options through a brokerage house of which one of the directors of plaintiff was a partner.

V.

Said options were so taken up by said 16 employees, including [83] the defendant herein, and such sales made by said employees, including defendant herein, using, in most cases, forms prepared or suggested by plaintiff. At no time from the date of the listing of the stock of plaintiff on a national securities exchange to the date of the filing of this action, did plaintiff issue any bulletin, circular, letter, notice or other document, calling the attention of plaintiff's employees, including this defendant, to the restrictions upon them or him under the Securities Exchange Act of 1934, relative to purchase and sale of stock within a six months' period.

VI.

In the purchases and sales of the stock of plaintiff by defendant, during the periods alleged in

plaintiff's complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director, and defendant was at all times a conscientious and honest employee and acted fairly and in good faith in said transactions.

VII.

Plaintiff, by its actions herein, is estopped from recovering profits, if any, from the transactions of defendant in the stock of plaintiff under said option agreement which plaintiff initiated and set up and which plaintiff, at least inferentially, assured defendant to be valid.

Conclusions of Law

I.

This is a suit in equity under Section 16 (b) of the Securities Exchange Act of 1934.

II.

It is inequitable to hold defendant liable for profits, if any, realized in the transactions here involved, while other employees holding identical options may purchase and sell stock of [84] plaintiff without such liability.

III.

Plaintiff is estopped from asserting liability against defendant by reason of the facts herein found.

IV.

The fundamental purposes of the Securities Exchange Act of 1934 have not been violated in any way by reason of the actions of the defendant.

Judgment is therefore ordered for the defendant and against the plaintiff.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,582-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

JUDGMENT

(In Favor of Defendant After Trial by Court)

The above-entitled case having been submitted for final determination and decision, following pretrial proceedings and trial on July 20, 1951, of certain issues of fact, before the Court, without a jury, the Honorable Harry C. Westover, United States District Judge, Judge Presiding; Latham & Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and the Court having duly considered the stipulations, the testimony and the briefs filed by the parties, and having further duly considered briefs filed by the Securities and Exchange Commission, as amicus curiae, and being fully advised; [87]

And the Court having heretofore made and filed its Findings of Fact, Conclusions of Law, Opinion and Order for Judgment,

Now, therefore, pursuant thereto,

It is hereby ordered and adjudged that plaintiff take nothing by this action.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951.

[Title of District Court and Cause.]

No. 12,583-HW—Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Order for Pre-Trial Proceedings having been made in the above-entitled action on March 7, 1951, and, pursuant to said Order, the parties having filed a Pre-Trial Stipulation, containing a stipulation of facts, a statement of facts which the parties are unable to concede, and a statement of plaintiff's objections to admissibility of certain stipulated facts, and thereafter, and further pursuant to said

Order, plaintiff having filed its Pre-Trial Memorandum of Law, its Pre-Trial Statement of Issues, its Supplemental Pre-Trial Memorandum of Law and its Second Supplemental Pre-Trial Brief, and defendant having filed his Pre-Trial Memorandum of Law, his Pre-Trial Statement of Issues, his Supplemental Pre-Trial Memorandum of Law, his Supplemental Pre-Trial Brief and his Second Supplemental Pre-Trial Brief;

And said cause having been called for pre-trial hearing on [90] July 13, 1951, and having, by order of the above-entitled Court made on said day, been set for trial on July 20, 1951, on certain limited issues of fact raised by the allegations contained in defendant's second, third, fourth and sixth defenses, contained in defendant's Amended Answer, and not stipulated or conceded by the plaintiff in the Pre-Trial Stipulation, and said matter having come on for trial on said limited issues on July 20, 1951, before the above-entitled Court, the Honorable Harry C. Westover, United States District Judge, Judge Presiding, a jury not having been demanded by plaintiff; Latham and Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and evidence having been received on the part of the parties, and said cause having been ordered submitted for final decision by agreement of the parties upon the question of liability only, all matters with regard to damages and the measure thereof having been reserved for

further proceedings, and the case having been so submitted by the respective parties;

And the Securities and Exchange Commission, by Louis Loss, Arden L. Andresen, Myer Feldman, Howard A. Judy and Hollis O. Black, its attorneys, having thereafter moved said Court for leave to file a memorandum as amicus curiae, and said motion having been granted on September 10, 1951, and the Securities and Exchange Commission having filed its Memorandum as Amicus Curiae, and defendant having filed his Memorandum in Opposition to Memorandum filed by Securities and Exchange Commission as Amicus Curiae, and the Securities and Exchange Commission having submitted an informal memorandum, in letter form, to the Judge Presiding in answer to defendant's said memorandum, and the Court being fully advised and having considered the stipulations of the parties and the testimony produced, hereby makes its Findings of Fact on the [91] issues, raised between plaintiff's Complaint and defendant's Amended Answer, such findings being limited to issues raised by the second, third, fourth and sixth defenses contained in said Amended Answer, and further makes its Conclusions of Law therefrom, as follows:

Findings of Fact

I.

On August 14, 1947, plaintiff and defendant entered into an option agreement, by the terms of which defendant was given the right to purchase

shares of plaintiff at a price of five ($5.00) dollars per share, during a period of five years, so long as defendant remained an employee of plaintiff. The option agreement was one of a series of similar agreements between plaintiff and sixteen of plaintiff's key employees, all executed prior to the listing of plaintiff's stock on any national securities exchange, as an incentive to these employees to remain in the employment of plaintiff and to use their best efforts for the benefit of plaintiff, and in lieu of additional compensation which plaintiff was unable to pay. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the existence of the option agreement and, in reliance thereon, defendant has been continuously employed by plaintiff since the date of the option agreement and to and including the date of the trial of this action.

II.

The option agreement between plaintiff and defendant further provided that it should not be effective for any purpose unless and until proper permits for the issuance of the option agreement and the shares provided for therein were obtained from the Commissioner of Corporations of the State of California. Prior to the execution of the option agreement and prior to the issuance of any shares thereunder, plaintiff applied for and obtained [92] a permit from the Commissioner of Corporations of the State of California permitting the execution of the option agreement and the issuance of the stock provided for therein.

III.

At all times up to and including the date of the option agreement the reasonable market value of plaintiff's stock was less than five ($5.00) dollars per share. During the period from the date of the option agreement to the date of the trial of this action plaintiff's operations were successful and plaintiff's stock appreciated substantially in market value. The success of plaintiff was the result, in a substantial degree, of the efforts of the 16 key employees holding option agreements, including the defendant in this case, and during this period plaintiff received the benefit of such efforts.

IV.

During the period covered by plaintiff's complaint, defendant was unable to purchase shares under the option agreement and to pay the taxes accruing upon such purchases, without concurrently selling a portion of his purchased stock, which said facts were at all times known to plaintiff. Subsequent to the listing of plaintiff's stock on a national securities exchange and subsequent to the rise in value of plaintiff's stock to a price higher than the price contained in said option agreement, plaintiff, through its officers, suggested to said 16 key employees, including the defendant herein, that said options be exercised annually, to lessen the impact of the tax accruing upon said options, and plaintiff further made known to said key employees that they could effect sales of stock in order to procure funds to take up their options through a brokerage

house of which one of the directors of plaintiff was a partner.

V.

Said options were so taken up by said 16 employees, including [93] the defendant herein, and such sales made by said employees, including defendant herein, using, in most cases, forms prepared or suggested by plaintiff. At no time from the date of the listing of the stock of plaintiff on a national securities exchange to the date of the filing of this action, did plaintiff issue any bulletin, circular, letter, notice or other document, calling the attention of plaintiff's employees, including this defendant, to the restrictions upon them or him under the Securities Exchange Act of 1934, relative to purchase and sale of stock within a six months' period.

VI.

In the purchases and sales of the stock of plaintiff by defendant, during the periods alleged in plaintiff's complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director, and defendant was at all times a conscientious and honest employee and acted fairly and in good faith in said transactions.

VII.

Plaintiff, by its actions herein, is estopped from recovering profits, if any, from the transactions of defendant in the stock of plaintiff under said option agreement which plaintiff initiated and set up and

which plaintiff, at least inferentially, assured defendant to be valid.

Conclusions of Law

I.

This is a suit in equity under Section 16 (b) of the Securities Exchange Act of 1934.

II.

It is inequitable to hold defendant liable for profits, if any, realized in the transactions here involved while other employees holding identical options may purchase and sell stock of [94] plaintiff without such liability.

III.

Plaintiff is estopped from asserting liability against defendant by reason of the facts herein found.

IV.

The fundamental purposes of the Securities Exchange Act of 1934 have not been violated in any way by reason of the actions of the defendant.

Judgment is therefore ordered for the defendant and against the plaintiff.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [95]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,583-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

JUDGMENT

(In Favor of Defendant After Trial by Court)

The above-entitled case having been submitted for final determination and decision, following pretrial proceedings and trial on July 20, 1951, of certain issues of fact, before the Court, without a jury, the Honorable Harry C. Westover, United States District Judge, Judge Presiding; Latham &

Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and the Court having duly considered the stipulations, the testimony and the briefs filed by the parties, and having further duly considered briefs filed by the Securities and Exchange Commission, as amicus curiae, and being fully advised; [97]

And the Court having heretofore made and filed its Findings of Fact, Conclusions of Law, Opinion and Order for Judgment,

Now therefore, pursuant thereto,

It is hereby ordered and adjudged that plaintiff take nothing by this action.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [98]

[Title of District Court and Cause.]

No. 12,584-HW—Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Order for Pre-Trial Proceedings having been made in the above-entitled action on March 7, 1951, and, pursuant to said Order, the parties having filed a Pre-Trial Stipulation, containing a stipulation of facts, a statement of facts which the parties are unable to concede, and a statement of plaintiff's objections to admissibility of certain stipulated facts, and thereafter, and further pursuant to said Order, plaintiff having filed its Pre-Trial Memorandum of Law, its Pre-Trial Statement of Issues, its Supplemental Pre-Trial Memorandum of Law and its Second Supplemental Pre-Trial Brief, and defendant having filed his Pre-Trial Memorandum of Law, his Pre-Trial Statement of Issues, his Supplemental Pre-Trial Memorandum of Law, his Supplemental Pre-Trial Brief and his Second Supplemental Pre-Trial Brief;

And said cause having been called for pre-trial hearing on [100] July 13, 1951, and having, by order of the above-entitled Court made on said day, been set for trial on July 20, 1951, on certain limited issues of fact raised by the allegations contained in defendant's second, third, fourth and sixth defenses, contained in defendant's Amended Answer, and not stipulated or conceded by the plaintiff in the Pre-Trial Stipulation, and said matter having come on

for trial on said limited issues on July 20, 1951, before the above-entitled Court, the Honorable Harry C. Westover, United States District Judge, Judge Presiding, a jury not having been demanded by plaintiff; Latham and Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and evidence having been received on the part of the parties, and said cause having been ordered submitted for final decision by agreement of the parties upon the question of liability only, all matters with regard to damages and the measure thereof having been reserved for further proceedings, and the case having been so submitted by the respective parties;

And the Securities and Exchange Commission, by Louis Loss, Arden L. Andresen, Myer Feldman, Howard A. Judy and Hollis O. Black, its attorneys, having thereafter moved said Court for leave to file a memorandum as amicus curiae, and said motion having been granted on September 10, 1951, and the Securities and Exchange Commission having filed its Memorandum as Amicus Curiae, and defendant having filed his Memorandum in Opposition to Memorandum filed by Securities and Exchange Commission as Amicus Curiae, and the Securities and Exchange Commission having submitted an informal memorandum, in letter form, to the Judge Presiding in answer to defendant's said memorandum, and the Court being fully advised and having considered the stipulations of the

parties and the testimony produced, hereby makes its Findings of Fact on the [101] issues, raised between plaintiff's Complaint and defendant's Amended Answer, such findings being limited to issues raised by the second, third, fourth and sixth defenses contained in said Amended Answer, and further makes its Conclusions of Law therefrom, as follows:

Findings of Fact

I.

On August 21, 1946, plaintiff and defendant entered into an option agreement, by the terms of which defendant was given the right to purchase shares of plaintiff at a price of five ($5.00) dollars per share, during a period of five years, so long as defendant remained an employee of plaintiff. The option agreement was one of a series of similar agreements between plaintiff and sixteen of plaintiff's key employees, all executed prior to the listing of plaintiff's stock on any national securities exchange, as an incentive to these employees to remain in the employment of plaintiff and to use their best efforts for the benefit of plaintiff, and in lieu of additional compensation which plaintiff was unable to pay. Defendant was induced to remain as an employee of plaintiff at the salary offered by plaintiff by reason of the existence of the option agreement and, in reliance thereon, defendant has been continuously employed by plaintiff since the date of the option agreement and to and including the date of the trial of this action.

II.

The option agreement between plaintiff and defendant further provided that it should not be effective for any purpose unless and until proper permits for the issuance of the option agreement and the shares provided for therein were obtained from the Commissioner of Corporations of the State of California. Prior to the execution of the option agreement and prior to the issuance of any shares thereunder, plaintiff applied for and obtained [102] a permit from the Commissioner of Corporations of the State of California permitting the execution of the option agreement and the issuance of the stock provided for therein.

III.

At all times up to and including the date of the option agreement the reasonable market value of plaintiff's stock was less than five ($5.00) dollars per share. During the period from the date of the option agreement to the date of the trial of this action plaintiff's operations were successful and plaintiff's stock appreciated substantially in market value. The success of plaintiff was the result, in a substantial degree, of the efforts of the 16 key employees holding option agreements, including the defendant in this case, and during this period plaintiff received the benefit of such efforts.

IV.

During the period covered by plaintiff's complaint, defendant was unable to purchase shares

under the option agreement and to pay the taxes accruing upon such purchases, without concurrently selling a portion of his purchased stock, which said facts were at all times known to plaintiff. Subsequent to the listing of plaintiff's stock on a national securities exchange and subsequent to the rise in value of plaintiff's stock to a price higher than the price contained in said option agreement, plaintiff, through its officers, suggested to said 16 key employees, including the defendant herein, that said options be exercised annually, to lessen the impact of the tax accruing upon said options, and plaintiff further made known to said key employees that they could effect sales of stock in order to procure funds to take up their options through a brokerage house of which one of the directors of plaintiff was a partner.

V.

Said options were so taken up by said 16 employees, including [103] the defendant herein, and such sales made by said employees, including defendant herein, using, in most cases, forms prepared or suggested by plaintiff. At no time from the date of the listing of the stock of plaintiff on a national securities exchange to the date of the filing of this action, did plaintiff issue any bulletin, circular, letter, notice or other document, calling the attention of plaintiff's employees, including this defendant, to the restrictions upon them or him under the Securities Exchange Act of 1934, relative to purchase and sale of stock within a six months' period.

VI.

In the purchases and sales of the stock of plaintiff by defendant, during the periods alleged in plaintiff's complaint, defendant did not make unfair use, or any use, of information obtained by defendant by reason of defendant's relationship to plaintiff as an officer or director, and defendant was at all times a conscientious and honest employee and acted fairly and in good faith in said transactions.

VII.

Plaintiff, by its actions herein, is estopped from recovering profits, if any, from the transactions of defendant in the stock of plaintiff under said option agreement which plaintiff initiated and set up and which plaintiff, at least inferentially, assured defendant to be valid.

Conclusions of Law

I.

This is a suit in equity under Section 16 (b) of the Securities Exchange Act of 1934.

II.

It is inequitable to hold defendant liable for profits, if any, realized in the transactions here involved while other employees holding identical options may purchase and sell stock of [104] plaintiff without such liability.

III.

Plaintiff is estopped from asserting liability

against defendant by reason of the facts herein found.

IV.

The fundamental purposes of the Securities Exchange Act of 1934 have not been violated in any way by reason of the actions of the defendant.

Judgment is therefore ordered for the defendant and against the plaintiff.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [105]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 12,584-HW—Civil

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

JUDGMENT

(In Favor of Defendant After Trial by Court)

The above-entitled case having been submitted for final determination and decision, following pre-trial proceedings and trial on July 20, 1951, of certain issues of fact, before the Court, without a jury, the Honorable Harry C. Westover, United States District Judge, Judge Presiding; Latham & Watkins, by Austin H. Peck, Jr., and Clinton R. Stevenson, appearing as attorneys for plaintiff, and Willis Sargent and Sidney H. Wyse, by Sidney H. Wyse, appearing as attorneys for defendant, and the Court having duly considered the stipulations, the testimony and the briefs filed by the parties, and having further duly considered briefs filed by the Securities and Exchange Commission, as amicus curiae, and being fully advised; [107]

And the Court having heretofore made and filed its Findings of Fact, Conclusions of Law, Opinion and Order for Judgment;

Now therefore, pursuant thereto,

It is hereby ordered and adjudged that plaintiff take nothing by this action.

Dated this 30th day of October, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

Approved as to form:

LATHAM & WATKINS.

By .....,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1951. [108]

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW, and
12,584-HW—Civil

NOTICE OF MOTION TO INTERVENE

To Consolidated Engineering Corporation, plaintiff, and Latham & Watkins, its attorneys, and to William D. Nesbit, Hugh F. Colvin and James R. Bradburn, defendants, and Willis Sargent and Sidney H. Wyse, [110] their attorneys:

Notice Is Hereby Given that Carmelo J. Pellegrino will move this Court on the 29th day of

November, 1951, at 10 o'clock a.m., for leave to intervene as a plaintiff in the above numbered consolidated actions in order that he may prosecute an appeal from the judgments hitherto rendered in these actions, as a stockholder and representative of the plaintiff corporation.

KENNY AND MORRIS.

By /s/ ROBERT W. KENNY,

Attorneys for Carmelo J. Pellegrino, Applicant for Intervention.

ORDER

Good cause being shown, the time of hearing and notice of the same is shortened to November 29th, 1951, at 10 o'clock a.m., provided copies of said notice are served on counsel for plaintiff and defendants on or before November 27th, 1951, at 5 o'clock p.m.

/s/ LEON R. YANKWICH,
District Judge. [111]

[Endorsed]: Filed November 27, 1951.

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW, and 12,584-HW

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

State of California,
County of Los Angeles—ss.

Robert W. Kenny, being first duly sworn, deposes and says that he is an attorney at law admitted to practice in the above-entitled Court, and that on November 23, 1951, he received a letter from Morris J. Levy, Attorney at Law, 261 Broadway, New York 7, [112] New York, requesting him to appear in this action for the purpose of seeking an order of intervention for Carmelo J. Pellegrino as plaintiff; that judgments in the above-entitled consolidated actions were entered by the District Court on October 30, 1951, and under the provisions of Rule 73 F.R.C.P. and Title 28 U.S.C. 2107, notice of appeal must be given within thirty (30) days from said date; that in order that Mr. Pellegrino may be given an opportunity to appeal the aforesaid judgment on behalf of the plaintiffs his motion to intervene must be heard on or before Thursday, November 29, 1951.

Affiant further states that he has been informed by New York counsel that Mr. Pellegrino is a stockholder of Consolidated Engineering Corporation and that the above-entitled actions were brought by the plaintiff corporation pursuant to his request dated October 2, 1950, and that a letter was re-

ceived on November 19, 1951, by New York counsel from Latham and Watkins, Esqs., attorneys for plaintiff Consolidated Engineering Corporation, stating that the Board of Directors of the said corporation had voted not to appeal from the aforementioned judgments.

/s/ ROBERT W. KENNY.

Subscribed and sworn to before me this 26th day of November, 1951.

[Seal] /s/ JANET MORONY,
Notary Public in and for
Said County and State.

Service of Copy attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 27, 1951. [113]

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW, and 12,584-HW

AFFIDAVIT IN SUPPORT OF APPLICATION TO INTERVENE

State of New York,
County of Kings—ss.

Carmelo J. Pellegrino, being duly sworn, deposes and says:

I am and have been a stockholder of Consolidated Engineering Corporation since September 11, 1950.

I presently own two (2) shares of the common stock of said Corporation.

That this affidavit is submitted pursuant to Rule 24 of the Federal Rules of Civil Procedure in support of my application for leave to intervene in the above-entitled [116] action as a party plaintiff.

That by registered letter dated October 2, 1950, my attorney, Morris J. Levy, Esq., requested Consolidated Engineering Corporation to institute suit, as contemplated by Section 16(b) of the Securities Exchange Act of 1934, to recover the profits realized by Messrs. Hugh F. Colvin, James R. Bradburn and William D. Nesbit, officers and/or directors of the Corporation, from their respective purchases and sales and sales and purchases of the Corporation's common stock within periods of less than six months.

In the said letter my attorney informed the Corporation that in the event it did not institute such suit within sixty (60) days, I would commence such suit on its behalf in accordance with the provisions of Section 16(b) of the Securities Exchange Act of 1934.

That by letter dated October 11, 1950, addressed to my said attorney, Latham & Watkins, Esqs., attorneys for Consolidated Engineering Corporation, stated that they had "undertaken in behalf of Consolidated Engineering Corporation to make a full investigation of the facts involved and the law applicable thereto" and would advise him further with respect to the matter.

That by letter dated November 21, 1950, ad-

dressed to my attorney, the Corporation's counsel aforesaid stated that "we have this date filed complaints against Messrs. Bradburn, Nesbit and Colvin for the recovery of profits under Section 16(b) of the Securities Exchange Act of 1934. Enclosed you will find a copy of each complaint with its corresponding file number. We shall keep you informed of the progress of this litigation."

That by letter dated January 24, 1951, addressed to my attorney, the Corporation's counsel stated that "Enclosed for your files are copies of the answers filed by the defendants in the three cases above referred to." [117]

That by letter dated October 29, 1951, counsel for the Corporation advised my attorney that Judge Harry C. Westover had rendered his opinion dismissing the suits as against all of the defendants herein. A copy of the opinion and a copy of the Findings of Fact and Conclusions of Law was enclosed therein.

That after my attorney had studied Judge Westover's opinion he advised me that it was his opinion that Judge Westover had erred and that there was a good chance that the United States Court of Appeals would reverse the Judgment of the District Court if an appeal were taken therefrom.

I advised my attorney to ascertain whether the Corporation would take such appeal, and if not, I was prepared to appeal from the Judgment as a stockholder of the Corporation.

That by letter dated November 15, 1951, counsel for the Corporation advised my attorney that "At

a meeting of the Board of Directors of Consolidated Engineering Corporation held November 12, 1951, the Directors considered whether or not the Company should appeal from the decisions of the United States District Court entered October 30, 1951. We are advised that the Board of Directors by resolution decided that the Company would not take an appeal in any of the three cases."

That I thereupon instructed my attorney to take the necessary steps so that I, as stockholder of the Corporation, could appeal from the Judgments entered.

Wherefore, deponent respectfully requests that the within application for leave to intervene as a party plaintiff in the above-entitled actions be granted.

/s/ CARMELO J. PELLEGRINO.

Sworn to before me this 26th day of November, 1951.

[Seal] /s/ SOL BRAGIN,
Notary Public, State of
New York.

My commission expires March 30, 1952.

State of New York,
County of Kings—ss.

I, Francis J. Sinnott, Clerk of the County of Kings, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, Do Hereby Certify, That Sol Bragin,

whose name is subscribed to the deposition, certificate of acknowledgment or proof of the annexed instrument, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his appointment and qualifications, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 27 day of Nov., 1951.

[Seal] /s/ FRANCIS J. SINNOTT,
Clerk.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 29, 1951. [119]

In the District Court of the United States for the Southern District of California, Central Division

No. 12,582-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

WILLIAM D. NESBIT,

Defendant.

No. 12,583-HW

CONSOLIDATED ENGINEERING CORPORATION, a California Corporation,

Plaintiff,

vs.

HUGH F. COLVIN,

Defendant.

No. 12,584-HW

CONSOLIDATED ENGINEERING CORPORATION,

Plaintiff,

vs.

JAMES R. BRADBURN,

Defendant.

ORDER DENYING INTERVENTION

The petition of Carmelo J. Pellegrino for permission to intervene in the above-entitled consoli-

dated actions as a plaintiff intervenor having come on for hearing in the [120] above-entitled Court on November 29, 1951, and good cause being shown, the aforesaid motion is denied and Carmelo J. Pellegrino is hereby denied leave to intervene as plaintiff in the above-named consolidated actions.

Dated November 29th, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed November 29, 1951. [121]

[Title of District Court and Cause.]

Nos. 12,582-HW, 12,583-HW and 12,584-HW—Civil

NOTICE OF APPEAL

Notice Is Hereby Given that the applicant to intervene, Carmelo J. Pellegrino, hereby appeals to the United States Court [122] of Appeals for the Ninth Circuit from the Order denying him leave to intervene dated November 29, 1951.

Dated November 29, 1951.

KENNY AND MORRIS,

By /s/ ROBERT S. MORRIS, JR.,
Attorneys for Applicant
to Intervene.

[Endorsed]: Filed November 29, 1951. [123]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 138, inclusive, contain the original Complaint, Amended Answer and Pre-Trial Stipulation in each of the above-entitled causes; Opinion; Findings of Fact and Conclusions of Law and Judgment in each of the above-entitled causes; Notice of Motion to Intervene with Affidavit of Robert W. Kenny in Support; Affidavit of Carmelo J. Pellegrino in Support of Motion to Intervene; Order Denying Intervention; Notice of Appeal; Designation of Record and Point on Appeal in each of the above-entitled causes; and Designation of Additional Portions of Record on Appeal in each of the above-entitled causes which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 3d day of January, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,220. United States Court of Appeals for the Ninth Circuit. Carmelo J. Pellegrino, Appellant, vs. William D. Nesbit, Hugh F. Colvin, James R. Bradburn and Consolidated Engineering Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 4, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13,220

CARMELO J. PELLEGRINO,

Appellant,

vs.

WILLIAM D. NESBIT, HUGH F. COLVIN, and JAMES R. BRADBURN,

Appellees.

STATEMENT OF THE POINT UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY FOR THE CONSIDERATION OF THE SAID POINT

To the Honorable Judge William Denman, and Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant, Carmelo J. Pellegrino, respectfully states that the following is the point upon which he intends to rely on appeal, to wit:

The District Court erred in denying appellant's Motion to Intervene in each of the actions, which are entitled Consolidated Engineering Corporation, a California corporation, Plaintiff, vs. William D. Nesbit, Defendant, No. 12,582-HW; Consolidated Engineering Corporation, a California corporation,

Plaintiff, vs. Hugh F. Colvin, Defendant, No. 12,583-HW; and Consolidated Engineering Corporation, a California corporation, Plaintiff, vs. James R. Bradburn, Defendant, No. 12,584-HW.

Appellant designates all the record as certified to this Court by the Clerk of the United States District Court as necessary for the consideration of the foregoing Point on Appeal.

Respectfully submitted,

KENNY AND MORRIS,

By /s/ ROBERT S. MORRIS, JR.,
Attorneys for Appellant,
Carmelo J. Pellegrino.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 18, 1952.